**Isadore Spiegel, an Individual t/a Spiegel Trucking Company; Spiegel Trucking Company, Inc.; I & L Trucking Company, Inc. *and* Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 22-CA-8838

July 27, 1981

## DECISION AND ORDER

On August 25, 1980, Administrative Law Judge George F. McInerny issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as explained herein.[1]

In the instant case, the Administrative Law Judge made the following findings. On November 8, 1978,[2] Respondent's employees presented a list of grievances to William Sanzalone, general manager of Spiegel Trucking and nephew of the owner, Isadore Spiegel.[3] Sanzalone told the drivers that he did not have the authority to resolve their grievances, and, in addition, he would not contact the vacationing Spiegel and ask him to consider the employees' complaints. The Administrative Law Judge found that "the absence of Mr. Spiegel, and Sanzalone's refusal to contact him on that morning . . . was the immediate cause of the strike which followed." The drivers never started working that morning. Instead, they went to the home of a fellow employee to discuss what they should do. They agreed to seek the assistance of a union. To this end, six employees went to the office of Local 863 of the Teamsters and met with a representative who gave them authorization cards for the drivers to sign. They returned to the house where the drivers were meeting and distributed the cards to the drivers who then signed them. Later that day, and on the days that followed, Respondent proceeded to discharge all but one of the drivers for failing to report to work.

The Administrative Law Judge concluded that the strike was concerted, protected activity, and that by discharging the drivers Respondent violated Section 8(a)(1) of the Act.[4] He further found that Respondent, when it threatened the drivers with discharge, and then discharged them for failing to return to work, converted the economic action of the employees into an unfair labor practice strike. Finally, the Administrative Law Judge found that by November 8 a majority of Spiegel's employees had signed valid authorization cards, and that, because of Respondent's "outrageous" and "pervasive" unfair labor practices—to wit, discharging all but one of its 22 employees—a bargaining order should issue.[5]

We have adopted all of the findings of the Administrative Law Judge. Respondent argues, *inter alia*, however, that the Administrative Law Judge improperly rejected its defense that the employees' activities were unprotected, because, according to Respondent, the employees had participated in a scheme to defraud the Company, and the strike was in furtherance of the scheme to defraud.[6] Alternatively, Respondent argues that the strike is unprotected because certain strikers allegedly engaged in strike misconduct by threatening other drivers in order to coerce their participation in the strike.

We have reviewed the evidence, and we find that the Administrative Law Judge properly rejected Respondent's argument that the strike was unprotected. The Administrative Law Judge found

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] All dates hereinafter refer to 1978, unless otherwise stated.

[3] A man named Yerkie, a salesman, was also present.

[4] He also found that Virnar Williams was discharged for supporting the Union, in violation of Sec. 8(a)(3) of the Act. Williams was discharged immediately after he admitted to Spiegel that he had signed a union card.

[5] We find it unnecessary to pass on the Administrative Law Judge's comments about the possible propriety of a bargaining order even in the absence of a majority, since here the Union had a clear majority at all relevant times. In adopting the bargaining order, we note that *Hedstrom Company a subsidiary of Brown Group, Inc.* v. *N.L.R.B.*, 558 F.2d 1137 (3d Cir. 1977), cited by the Administrative Law Judge, was reversed in an *en banc* decision which issued only a few days before the Administrative Law Judge's Decision here. *Hedstrom Company a subsidiary of Brown Group, Inc.* v. *N.L.R.B.*, 629 F.2d 305 (3d Cir. 1980). In *Hedstrom II* the full court enforced the Board's bargaining order, although the violations were not as pervasive as those found here.

In addition, in adopting his finding of a bargaining order we rely solely on the 19 authorization cards obtained by November 8, without reference to the additional 2 cards which were obtained on November 11. In adopting the recommended bargaining order, we do not rely on the employees having returned to work during the strike as proof that Respondent's unfair labor practices hindered the strike. Chairman Fanning notes that no exception was filed to the conclusion that Respondent's bargaining obligation arose November 8, when the Union attained majority.

[6] Respondent also excepts to the Administrative Law Judge's statement that Respondent's burden with respect to the defense was "formidable." Respondent claims that the Administrative Law Judge was improperly establishing a higher standard of proof than that of proof by a preponderance of the evidence. It seems clear, however, in context, that the Administrative Law Judge was merely saying that the defense was difficult to prove. For example, Respondent needed to prove knowing participation of the drivers, yet at least two key witnesses with knowledge of the events asserted their Fifth Amendment right and refused to testify on the grounds that their testimony could be incriminating. Thus, Respondent certainly had a difficult defense to prove, but the standard for the defense remained the same.

that Respondent was defrauded of large sums of money in the spring and summer immediately preceding the events herein. While Respondent was able to establish the existence of the fraud, it did not establish that its drivers knew about and/or participated in the fraud. Nor was there a showing that the strike was caused by or in furtherance of the fraud. Rather, the Administrative Law Judge concluded that the employees struck because they wanted to discuss their grievances with Spiegel, the only person who had complete authority to resolve grievances.[7] Accordingly, the strike was protected under Section 7 of the Act.[8]

Finally, there is an issue as to employee misconduct during the strike. Respondent argues that during the strike certain employees threatened fellow employees in order to keep them from working, and that these threats rendered the strike unprotected. The record shows that three employees received some sort of threat. On November 10 or 11, Doug Cleveland received an anonymous telephone call and was told that if he went to work he would get hurt. Ernest Gause testified, generally, that he received a message from an unknown party that he "better be careful." Clarence Allen testified that he was threatened twice by driver Willie Biggins. On the evening of November 8, Biggins told him if he took his truck out, "they" would stop him if they had to use violence. Allen drove his truck the next day anyway and that evening Biggins called him again and told him that "they" said that, "you take that truck, it won't never get back in the yard." Allen discussed these threats with the dispatcher, Gonnella, and, on his advice, he stopped working for approximately 2 days.

The Administrative Law Judge found, and we adopt that finding, that the walkout and the signing of the authorization cards by a majority of the employees occurred before any threats were made. We also find that the strike did not become unprotected as a result of these threats. Most importantly the threats were not originated or sanctioned by the striking employees as a group. There were very few threats, and two of them are not attributable to strikers, even on an individual basis. The isolated statements by Biggins acting on his own do not render unprotected the concerted activity of the strikers as a whole. *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973).[9]

[7] The grievances covered a broad range of subjects, including the issue of a new work report.

[8] We recognize that the question of driver participation in the fraud is relevant not only to the possible cause of the strike, but to whether the employees would be entitled to reinstatement with backpay. We have given the complete make-whole remedy because Respondent has failed to establish employee participation and/or knowledge of fraud. If substantial, newly discovered evidence is forthcoming, however, the issue may be reconsidered at the compliance stage.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Isadore Spiegel, an individual t/a Spiegel Trucking Company, his heirs, administrators, executors, and assigns; Spiegel Trucking Company, Inc.; I & L Trucking, Company, Inc., Harrison, New Jersey, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[9] Respondent also seems to suggest that reinstatement might not be appropriate for Biggins because of the threats. Respondent, however, offered to reinstate Biggins on January 27, 1979, after it had knowledge of the threats through Gonnella. It never sought to deny him employment for alleged strike misconduct at any time. We have held that misconduct not relied on cannot justify a denial of reinstatement. *Terry Coach Industries, Inc.*, 166 NLRB 560, 563, fn. 10 (1967), citing *Kohler Co.*, 128 NLRB 1062, 1239 (1960). See also *Advance Pattern and Machine Corporation d/b/a Gibraltar Sprocket Co.*, 241 NLRB 501-502, fn. 9 (1979).

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten our employees with discharge because they have exercised their rights under Section 7 of the National Labor Relations Act, as amended.

WE WILL NOT interrogate our employees about their union activities, or without statutory safeguards.

WE WILL NOT discharge our employees because of their union activities.

WE WILL NOT change the terms and conditions of employment without bargaining with Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

WE WILL, upon demand, bargain with Local 863.

WE WILL offer immediate and full reinstatement to:

| | |
|---|---|
| James Braime | Berkley Smith, Sr. |
| Thomas McCue | Berkley Smith, Jr. |
| Douglas Cleveland | Vander Ezzell |
| | McKinley Young |
| Jose Santiago | David Brown |
| Chris Miller | Virnar Williams |
| Collie Stradford | John Hobbs |
| James Morrison | Leroy Chandler |
| Willie Biggins | Sterling Campbell |
| Joseph Stevens | Leroy Allen |
| Matthew Spencer | Ernest Gause |

to their former jobs, or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges, and WE WILL make them whole for any loss of earnings, plus interest, they may have suffered as a result of our unlawful discrimination.

ISADORE SPIEGEL, AN INDIVIDUAL T/A SPIEGEL TRUCKING COMPANY; SPIEGEL TRUCKING COMPANY, INC.; I & L TRUCKING COMPANY, INC.

## DECISION

### STATEMENT OF THE CASE

GEORGE F. MCINERNY, Administrative Law Judge: Based upon a charge filed on November 15, 1978, by Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the Union, which charges were amended on November 17, 1978, and December 12, 1978, the Regional Director for Region 22 of the National Labor Relations Board, herein referred to as the Board, issued a complaint on April 19, 1979, alleging that Spiegel Trucking Company had violated and was violating Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, herein referred to as the Act. On April 26, Respondent[1] filed an answer to the complaint, denying the commission of any unfair labor practices.

Thereafter, on April 25 and 30, 1979, the Union again amended the charges herein. As a result of these amendments the said Regional Director issued an amended complaint on May 2, 1979, alleging that Isadore Spiegel, an Individual t/a Spiegel Trucking Company; Spiegel Trucking Company, Inc.; I & L Trucking; Spiegel-Sussman Appliance Distribution Center; Trans Pet, Inc.; I. Spiegel Co.; and Spiegel Trucking Rental Co., Inc., as a single integrated business enterprise within the meaning of Section 2(2) of the Act, had violated and was violating Section 8(a)(1), (3), and (5) of the Act. Respondent filed an answer to the amended complaint denying the commission of any unfair labor practices and further denying that all of the entities named in the amended complaint, with the exception of Isadore Spiegel, an Individual t/a Spiegel Trucking Company and Spiegel Trucking Company, Inc., constituted a single integrated employer.

Pursuant to notice contained in the original complaint and in the amended complaint, a hearing was held before me in Newark, New Jersey, beginning on June 11, 1979, and continuing on June 12 and 13, July 9 and 10, and August 7 through 10, 1979, at which all parties were given full opportunity to present testimony and documentary evidence and to argue orally.[2]

After the close of the hearing Respondent and the General Counsel submitted briefs which have been carefully considered.

Upon the entire record in this case, including my observation of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. JURISDICTION

The first question which arises in this case is the issue of whether or not sufficient facts exist, or are admitted, or may be inferred, to establish the statutory and discretionary jurisdiction of the Board. A second question in this threshold area is which, if any, of the employers named in the amended complaint constitute a single, integrated entity so as to warrant their inclusion by me in determining their responsibility or liability for the unfair labor practices alleged in that complaint.

Here the General Counsel has alleged in the amended complaint that Spiegel Trucking Company, Inc., I & L Trucking, Inc., Sussman Spiegel Appliance Distribution Center, Trans Pet, Inc., I. Spiegel, Inc. and Spiegel Trucking Rental Co., Inc., are all New Jersey corporations; that all of these entities constitute a single, integrated enterprise engaged in the business of providing and performing transportation and related services from "its" Harrison, New Jersey, location; that they are a single employer within the meaning of Section 2(2) of the Act; and that during the 12 months preceding the issuance of the amended complaint they provided trucking services valued in excess of $50,000, of which trucking services valued in excess of $50,000 were performed in States of the United States other than the State of New Jersey.

The burden is on the General Counsel to prove affirmatively and by substantial evidence the facts which he asserts are so. *N.L.R.B.* v. *Gottlieb & Co.*, 208 F.2d 682 (7th Cir. 1953). Here, the General Counsel's burden was made more difficult by two factors. The first was the refusal by Respondent to turn over subpenaed materials including the corporate books and records for all of the

[1] The term "Respondent" is used herein to describe an entity which I find, *infra*, to be an integrated business enterprise.

[2] During the hearing, the General Counsel amended the complaint to allege further violations of Sec. 8(a)(5). Respondent, in turn, denied these allegations and also amended its answer. These developments will be discussed below.

named corporations.[3] The second was the failure of Isadore Spiegel to testify in this proceeding.[4]

In the light of these circumstances I will now proceed to review the state of the pleadings, and the evidence, with respect to the one individual and six corporate entities alleged to constitute a single employer to determine whether the record admits of a conclusion that the fact of a single, integrated business entity has been established, and, if so, whether that entity meets the Board's jurisdictional standards.

### A. *Sussman Spiegel Appliance Distribution Center*

Even though counsel for Spiegel did not state at the hearing that he represented this entity, his answer to the amended complaint purports to speak for Sussman Spiegel Appliance Distribution Center. The answer then admits the fact that it is a New Jersey corporation, but denies the allegation that it is part of a single integrated business enterprise and that it meets the Board's jurisdictional standards or is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The only evidence in the record concerning Sussman Spiegel Appliance Distribution Center is derived from the testimony of William Sanzalone, the general manager for Isadore Spiegel, an Individual, and for Spiegel Trucking Company, Inc. While Sanzalone identified himself as Spiegel's nephew, and stated that he had worked for Spiegel interests for 2 years, he was directly involved at the Harrison, New Jersey, location only since June or July 1978 and was physically present there on a full-time basis only since October. Thus, he professed to be unfamiliar with much of the background of this case, including the nature and functions of the entities named in the amended complaint.[5]

Sanzalone testified that Sussman Spiegel Appliance Distribution Center was "a company that has been around" at the Harrison location. He stated that it had no offices at Harrison and that he received no compensation from it. There is no further testimony concerning it.[6]

At the hearing I dismissed the complaint as to Sussman Spiegel Appliance Distribution Center on the basis that there was no evidence that it was a corporation. The counsel for the General Counsel did not object to the dismissal, nor did she take any position in her brief on the issue. However, the record does show that, even though there was no evidence on the subject, Respondent's answer to the amended complaint does purport to be filed on behalf of Sussman Spiegel Appliance Distribution Center, and admits the fact that it is a New Jersey corporation. My grounds for dismissal on this issue are therefore erroneous. However, this circumstance does not require a different conclusion. Even if I assume, as I may here, that Isadore Spiegel owns and controls Sussmun Spiegel Appliance Distribution Center, the record contains no evidence that it had any connection with the events which make up this case, and, more significantly, that it ever employed any employees. Thus, I find that Sussman Spiegel Appliance Distribution Center has not been shown to be, and is not, an employer within the meaning of Section 2(6) and (7) of the Act. My ruling dismissing the amended complaint as to this entity is affirmed.

### B. *I. Spiegel, Inc.*

There is even less evidence in the record concerning this alleged employer. Counsel for Spiegel did not appear on behalf of I. Spiegel, Inc., although he did deny that it is a New Jersey corporation, as well as other jurisdictional allegations in the amended complaint. There is no evidence in the record that it even existed. Sanzalone, whose unfamiliarity with the whole Spiegel operation was noted above, testified that he had never heard of I. Spiegel, Inc. Again, even if I were to infer and find that it is a New Jersey corporation, owned and controlled by Isadore Spiegel, there is no evidence that it had anything to do with this case, or that it had any employees. Accordingly, I reaffirm my ruling at the hearing dismissing the amended complaint as to I. Spiegel, Inc.

### C. *Spiegel Trucking Rental Co., Inc.*

As with I. Spiegel, Inc., counsel entered no appearance on behalf of Spiegel Trucking Rental Co., Inc., but did deny the jurisdictional facts alleged in the amended complaint. The evidence shows that an entity called "Spiegel Truck Rental" appears as the lessor in a lease of vehicles to an individual involved in this case in December 1978.[7] The person who signed the lease on behalf of Spiegel Truck Rental is William Sanzalone. Sanzalone testified that Spiegel Truck Rental was not a corporation or a partnership. He further stated that Spiegel Truck Rental was used "mainly for billing purposes" on local deliveries in the northern New Jersey commercial zone. This was not amplified further. In the absence of any evidence that Spiegel Truck Rental Co., Inc., ever employed any employees, I do not think the existence of the leases warrants a finding that it is an employer within the meaning of Section 2(6) and (7) of the Act. I affirm

[3] I ruled that these materials were relevant and material to these proceedings. In the circumstances I am permitted to draw adverse inferences against Respondent in areas where this material is relevant to the issues. *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW) [Gyrodyne Co. of America]* v. *N.L.R.B.*, 459 F.2d 1320 (D.C. Cir. 1972); and *Gyrodyne Company of America, Inc.*, 203 NLRB 1120 (1973). See also *N.L.R.B.* v. *Wallick Schwalm, Inc.*, 198 F.2d 477 (3d Cir. 1952).

[4] Spiegel was subpenaed as a witness by the General Counsel. According to his counsel, he was too ill to testify. I was shown a letter appearing to be written by a physician stating that Spiegel was suffering from a serious heart condition which, in the opinion of the writer, might result in serious, or even fatal, medical consequences, if Spiegel were to testify. There was, however, no request by the General Counsel for enforcement of the subpena and no request from Respondent for a continuance. I am thus left to draw whatever inferences are permissible and appropriate from his failure to appear.

[5] I assume, for this portion of this decision, that Sanzalone was truthful in his testimony on these issues. With respect to other issues I will evaluate his credibility below.

[6] A person named Stanley Sussman was identified in the record as the general manager of I & L Trucking, Inc. He did not testify in this proceeding. There is no evidence which would identify this Sussman with Sussman Spiegel Appliance Distribution Center.

[7] There is evidence that a number of individuals named as discriminatees in this case signed identical leases.

my ruling made at the hearing dismissing the amended complaint as to Spiegel Truck Rental Co., Inc.

### D. *Transpet, Inc.*[8]

Counsel did not appear for Transpet and the answer states that Respondent has no knowledge or information on the state of incorporation of Transpet. Further, the answer denies that Transpet is a part of a single, integrated enterprise.

William Sanzalone testified at one point that Transpet is a contract carrier for Hartz Mountain Company, a manufacturer of pet supplies; and at another point asserted that Transpet is owned by Hartz Mountain. Sanzalone did testify that Spiegel had an agreement with Transpet to manage the transportation operations of Transpet. This statement was corroborated by a copy of a document dated November 30, 1971, and entitled "Management Agreement" introduced into evidence by Respondent, and a document introduced into evidence by the General Counsel which the parties agreed is an order of the Interstate Commerce Commission dated May 9, 1972 (service date May 14, 1972). The parties agreed that these documents represented the current state of the relationship between Spiegel and Transpet at the time of the events which make up this case.

The first document, the management agreement, was entered into by Transpet and Isadore Spiegel as an individual. The agreement averred that Transpet was the holder and owner of a permit as a contract carrier issued by the Interstate Commerce Commission, and that Transpet desired to engage Spiegel to supervise the day-to-day operations of Transpet under the permit, and for the purpose of managing Transpet's business. Spiegel represented that he had experience in motor carrier operations which warranted his undertaking this task. Since Spiegel himself owned and operated a contract carrier under a permit from the Interstate Commerce Commission, prior approval of that commission was necessary before the agreement could be put into effect, and the agreement was to become effective within 15 days after the effective date of a final order of the commission for the authority proposed. The agreement provided for its termination on 60 days' notice by either party, a change in ownership of Transpet, or on Spiegel's death or assignment of the agreement.

The operative terms of the agreement provided that:

> Transpet engages, hires, and employs Spiegel as the general business manager of all of its operations and business for a term of one year from the effective date hereof and for a like term automatically year to year thereafter, unless sooner terminated . . . .

Spiegel's duties as general manager included supervision and direction of all local and over-the-road operations of Transpet, the assumption of all operating costs of all Transpet properties, and

> Assumption of responsibility for all personnel, including drivers, dispatches, mechanics, office personnel, bookkeepers and any and all other personnel associated with Transpet; as well as the hiring of replacement personnel, and the dismissal of personnel for cause.

Spiegel's compensation for his management of Transpet was to be Transpet's net profit as determined by its auditors on a quarterly basis.[9] It was further agreed that the net profit to be received by Spiegel "should be" no less that three percent of Transpet's annual gross revenues.

After executing this agreement, the parties filed an application for approval on December 2, 1971, with the Interstate Commerce Commission. As noted above, the Commission approved the application on May 9, 1972.[10] The agreement, then, apparently took effect sometime within 15 days after the service date of the Commission's order on May 15, 1972.

Despite these financial arrangements, which would seem to contemplate no payments to Spiegel other than the $250 weekly draw and the percentage of revenues, Sanzalone testified that he received payments from Transpet for services he rendered to it. One of Spiegel's truck drivers testified as to payments from Transpet, but qualified that by referring to those payments as "advances." The latter payments could very well come within the $250 weekly draw and I consider that Sanzalone's statements in this regard reflect adversely on his memory and credibility rather than on the possibility of some different arrangement than was set forth in the management agreement between Spiegel and Transpet.[11]

Finally, the evidence does not show that Transpet had any employees at any time material to this case. This fact, together with the intention of the parties to transfer the total management functions to Spiegel, was in fact carried through. Transpet had no authority or control over hiring, firing, or discipline. Spiegel and Sanzalone controlled the labor relations of the Transpet operation and that operation was totally integrated with Spiegel's individual operation and that of Spiegel Trucking Company, Inc. However, there is no evidence that Spiegel had or has any financial or other interest in Transpet. Indeed, the order of the Interstate Commerce Commission shows that Transpet is controlled by Sternco Industries, an affiliate of Hartz Mountain. The facts are thus clear that the parties were dealing at arm's length and that Spiegel was a bona fide independent contractor of Transpet.

In these circumstances I cannot find that Transpet and Spiegel constitute a single, integrated employer of the employees involved here and, further, I cannot find that Transpet is an employer within the meaning of Section

[8] The amended complaint referred to this entity as "Trans Pet" but the spelling as one word is more accurate.

[9] Spiegel had the right to draw $250 per week against these profits.

[10] I note that the Commission found that Transpet is controlled by Sternco Industries, Inc., which, in turn, was affiliated with Hartz Mountain Products Corp.

[11] Similarly, Sanzalone testified that Transpet owned no trucks, whereas the appendix to the management agreement lists two tractors, a van, and a trailer as owned by Transpet, and transferred to Spiegel's operation. There is no evidence that these vehicles were still in operation at the time of this hearing.

2(6) and (7) of the Act. *Gifford-Hill & Co.*, 90 NLRB 428 (1950).

### E. *I & L Trucking, Inc.*

Counsel for Spiegel appeared at this hearing for I & L Trucking, Inc. The answer to the amended complaint admitted that I & L is a New Jersey corporation, but denied that it is part of a single, integrated enterprise and that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Spiegel enterprises are located on a 15-1/2-acre site in Harrison. At the entrance is an office housing the dispatches and clerical employees. In back of that is a warehouse. At the end of the warehouse is a garage and a fuel tank. In the rear and on one side of the buildings are parking and storage areas for tractors and trailers. On a second floor above the warehouse are various offices of businesses which are not connected with Spiegel.

I & L Trucking, Inc., was described by Sanzalone as a "warehouse that we operate," referring to the Spiegel operation and, at another point, as an interstate carrier of appliances which also operated a public warehouse. He further identified Isadore Spiegel as the owner of I & L, and Stanley Sussman as its manager. Spiegel and Sussman control the labor policies at I & L.

At the time of the events constituting this case I & L employed 15 or 16 employees. The majority of these were warehouse employees. Counsel for Spiegel represented at the hearing that I & L had a current collective-bargaining agreement with Local 617 of the Teamsters Union covering these warehouse employees. At the same time I & L employed four truckdrivers; John Hobbs, Andy Braime, Nate Bregman, and Bob Hubiak. According to Sanzalone, Hobbs was a tractor-trailer driver and the others drove straight trucks. Counsel for Spiegel also represented that this contract would not operate as a bar to a unit of truckdrivers alleged in the amended complaint.[12] On the basis of these representatives neither I nor the General Counsel pressed further for a copy of the collective-bargaining agreement which had been subpenaed by the General Counsel.

John Hobbs was employed by I & L as a tractor-trailer driver from June until November 1978. He had previously worked for Spiegel as a driver and, during the time he worked for I & L, he testified that he was sometimes dispatched by Spiegel's dispatcher and sometimes worked for Spiegel if there was nothing to do at I & L. Hobbs participated in a work stoppage and he was called on the telephone and told he was fired by Spiegel's dispatcher. Afterwards, Hobbs received two telegrams directing him to report back to work for "Spiegel Trucking." There was no difference in the treatment Hobbs received from that accorded a number of other drivers for Spiegel who testified in this case. None of the other I & L drivers testified and their names do not appear on the list of discriminatees contained in the amended complaint. However, Sanzalone admitted that they, too, might have worked for Spiegel, but he did qualify this by pointing out that they did not employ tractor-trailer drivers.

The following facts show an identity of ownership of I & L, Spiegel individually, and Spiegel Trucking Company, Inc.: Common control and implementation of labor policies by Isadore Spiegel; substantial identity of endeavor, all three firms being involved in trucking; some interchange of employees; and substantially equal treatment of employees of Spiegel and I & L who engaged in a work stoppage.

In these circumstances I find that I & L constitutes a single, integrated enterprise together with Isadore Spiegel, an individual t/a Spiegel Trucking Company and Spiegel Trucking Company, Inc. *I. D. Lowe (Trustee for Barber J. Thomas, Richard C. Lydle and Marilyn K. Lyren), doing business as Thermo-Rite Manufacturing Company, etc.*, 157 NLRB 310 (1966). While there is no evidence of the revenues received by I & L, since Respondent has admitted the fact that Spiegel as an individual and Spiegel Trucking Company, Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, additional jurisdictional facts are not necessary, since the existence of those facts with respect to one part of an integrated enterprise will include the other parts of the same enterprise. *Swift Cleaners, Inc.*, 191 NLRB 597 (1971); *The Family Laundry, Inc., Standard Coat, Apron and Linen Service, Inc.*, 121 NLRB 1619 (1958).

### F. *Spiegel Trucking Company, Inc.*

Spiegel Trucking Company, Inc., is a New Jersey corporation operating under interstate trucking rights from its terminal and warehouse complex in Harrison, New Jersey, from which place it performs trucking services. The value of such services for the calendar year preceding the issuance of the amended complaint herein exceeded $50,000. The answer admits that Spiegel Trucking Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### G. *Isadore Spiegel*

Isadore Spiegel, an individual, trading as Spiegel Trucking Company, herein referred to as Spiegel, is an individual proprietor doing business under the trade name and style of Spiegel Trucking Company. Spiegel operates out of a terminal and warehouse complex in Harrison, New Jersey, whence he annually performs trucking services. While the evidence shows that Spiegel possesses no interstate trucking rights, it further shows that he operates within a so-called commercial zone which includes portions of New York as well as New Jersey. The value of such services for the calendar year preceding the issuance of the amended complaint herein exceeded $50,000. The answer admits that Spiegel is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### H. *Conclusion*

I thus conclude that Sussman Spiegel Appliance Distribution Center; I. Spiegel, Inc.; Spiegel Trucking Rental, Inc.; and Transpet, Inc., are not employers en-

[12] Counsel also stated, and may have been under the impression, that I & L did not employ any drivers.

gaged in commerce. I find further that Isadore Spiegel, an individual trading as Spiegel Trucking Company, Spiegel Trucking Company, Inc., and I & L Trucking, Inc., constitute a single, integrated employer, hereinafter referred to as Respondent, and that this employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The amended complaint alleges, the answer admits, and I find that Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICES

### A. *The November 2 Notice*

As I have noted above, William Sanzalone, Spiegel's nephew, had been employed by him for about 2 years in various capacities. In October 1978 he came to the Harrison location, sometimes referred to as "Spiegel City," on a full-time basis.

At that time the assignment of work, hiring and firing of drivers, and reconciliation of payroll data was all handled by the dispatcher, Carmen Gonnella.[13] Most of Respondent's trucking operations involved the transport of furniture and office supplies manufactured by a company called Art Metal, located in Newark. Respondent kept two full-time employees permanently stationed at Art Metal's premises where they shuttled empty trailers to the loading docks and moved full trailers from the docks to other places in the yard to await pickup. The papers covering each trailer, in the form of bills of lading and weigh bills (the latter were referred to by Sanzalone as "pro-bills") were then transmitted to Gonnella. He would then assign a driver to pick up a particular trailer. Gonnella recorded these assignments on a large dispatch sheet, noting for each day the driver's name, the container (trailer) identification, and the destination of the shipment.[14] Each morning the drivers would pick up the weigh bills and deliver the load as directed.[15] After making the delivery drivers returned to the dispatch office and handed in the copies of the weigh bills receipted by the consignee to show that delivery was made. Gonnella would then note the employee's hours, on what Sanzalone described as a "scrap" of paper 1-1/2 by 2-1/2 inches in dimension, and give that to the bookkeeper, who, in turn, would prepare the payroll from the information contained on the paper. Respondent's drivers performed other duties, including local deliveries within the so-called commercial zone in New Jersey and New York, and picked up and delivered trailers from the waterfront to various locations.

After he had been working at Harrison for a while Sanzalone became concerned about what he considered insufficient control over the employees' work activities.[16] In order to provide himself with more information about these daily activities, he devised a daily work report form to be filled out by all drivers.[17] On November 2, 1978, he posted a copy of this work report form, together with a notice which read as follows:

> Attention All Drivers Effective 11/6/78
>
> Each driver will be issued 1 work report form a day. They are to be filled in during the day. Each movement must be written down completely. *No exceptions*! You must turn in these reports at the end of the day with your paperwork to match each movement. Your pay will be figured out according to these reports. *No report—No pay* "Road drivers to get 1 report at the start of each trip and they are to be turned in at the end of the trip.
>
> Please Cooperate
> Thank You
> William Sanzalone

### B. *The Events of November 8*

There is no question but that the drivers were upset and angry over this requirement. There are hints in the record that there were informal discussions among drivers on Friday, November 2, and Monday and Tuesday, November 6 and 7.

Whatever happened on those days, it is not disputed that a group of 21 or 22 drivers gathered outside the dispatch office on November 8 at or about 7:30. They began by talking among themselves about the November 2 notice, about wages, about mechanics threatening drivers, and other things.

At 7:35 Sanzalone came into the yard. The employees told him that they wanted to talk to Spiegel. Sanzalone invited them into Spiegel's office, which was large enough to accommodate the whole group. At some point, whether before Sanzalone arrived or after they all gathered in Spiegel's office, the employees wrote down on a sheet of yellow ruled paper a list of grievances. Sanzalone informed the employees that Spiegel was on a "working vacation" in the Bahamas, but they insisted on discussing the grievances with Sanzalone. There is some indication that the meeting was confusing, with a number of employees trying to talk at once, but there is no evidence that it was disorderly or threatening. In the end each driver who had put down a particular grievance discussed that grievance. They continued to demand a

[13] Gonnella was named in the amended complaint as a supervisor. Respondent's answer is not clear on the status of Gonnella. However, Sanzalone's testimony makes it clear that Gonnella had the right to hire and fire and authority responsibly to direct the work of employees. I find him to be a supervisor within the meaning of Sec. 2(11) of the Act. Gonnella is also referred to in the record as "Ganella."

[14] The dispatch sheet as printed showed a separate category of assignments under the heading "Transpet." Sanzalone testified that this had no significance during the period he was familiar with. There is no evidence which would contradict this statement so I will accept it as true. In so doing, I find that shipments undertaken by Respondent for Transpet, or for any other consignor, were handled in much the same way.

[15] Assignments were actually made the night before, so that the drivers could gauge their reporting time in the morning based on the length of the trip to which they were assigned.

[16] He apparently came over to Harrison with somewhat vaguely defined managerial functions. He testified that up until November 8 Gonnella actually ran Respondent's operation.

[17] The reasons why Sanzalone did this will be described at greater length in my discussion of Respondent's defense below.

meeting with Spiegel, particularly since Sanzalone, and some one named Yerkie, whose title was that of salesman but whose functions at this meeting were undefined, told the employees that they were working on getting more money for the employees, but could not help them with anything else.

Sanzalone finally told the employees to make up their minds whether they were going to go to work that day. He left them alone and, after some further discussion, the employees voted to refuse to work until Spiegel met with them to discuss the grievances. They gave the list of grievances to Sanzalone who made a copy of it. They then had it signed by the 21 people who were present and left the premises.

They did not disperse, however, but repaired in a body to the home of one of them, Collie Stradford, who lived near Respondent's facility in Harrison. There they continued to discuss their problems and what they were going to do next. The result of this discussion was a decision that they would try to get into a union so they could get some kind of representation. On Stradford's recommendation, employees Chandler, Biggins, Morrison, Gause, and Hobbs went to the offices of Teamsters Local 863. They met there with John Frantantoni. He gave them some authorization cards, read the cards to them, and asked if they understood what the language on the card meant. They did so, and Morrison, Stradford, Chandler, and Gause signed cards there at the union office. Frantantoni told them to make sure that the other employees understood the cards and that each driver had to sign his own card. He further told them to return the cards to him when they were signed.

Stradford and the others returned to the house, passed out the cards, explained them, and had the others sign them. They then returned the signed cards to the Union.[18]

### C. *The Discharges of Employees*

Respondent's reaction to the employees' walkout was swift and decisive. Sanzalone admitted that he talked to Spiegel on the telephone on November 8. He did not testify as to the content of that conversation but it is logical to assume, as I do, that both men were concerned with the walkout and the need to get the enterprise functioning again.

Sanzalone testified that on the afternoon and evening of November 8, and on November 9, he personally called a number of employees and asked them if they were coming into work. On their reply that they were not, he testified that he told them they "could" be fired.[19]

Sanzalone's testimony that he called a number of employees was corroborated only by Clarence Allen, a driver, who testified that Sanzalone had spoken to him, presumably on November 8, and asked him to come to work.

Other employees testified that they had called or had been called by Carmen Gonnella or another dispatcher named Bernie Valenti. John Hobbs stated that on the night of November 8 he was called by Valenti who asked him whether he was coming in to work. Hobbs replied by asking whether any other drivers were coming in. Bernie said there were none that he knew of and Hobbs said that he guessed he would not be in either. Bernie then said to Hobbs that he was told to tell him he was fired.[20] Hobbs then asked to speak to Gonnella, who came on the telephone. Hobbs asked him what was going on. Gonnella then said that he had received word—that all he knew was that Spiegel said fire everybody. Gonnella continued by saying that he did not know what was wrong with Spiegel, but maybe he was "going crazy," and that Spiegel had said that everyone who was not there (at work) was fired.

David Brown, a driver, testified that he called the dispatch office on the night of November 8 and talked to Gonnella. Gonnella said there was no work. Brown asked if that meant he was fired and Gonnella said, "I guess that's what it means."

Berkley Smith, Sr., and Matthew Spencer testified that on November 9 at or about 4:30 or 5 p.m., they went to Spiegel's place. They walked into the office and Sanzalone asked if they were coming to work the next day. Spencer said, "no," and Smith said that if the rest of the group did, then he would come in. Sanzalone then told them they were fired. Sanzalone's version of this conversation was that he asked them if they would work on the next day, and on their refusal he said that he had a lot of work to do and "if a guy refuses to work I just figured, you know, you can fire him for that." Despite this, Sanzalone denied that he told Smith and Spencer that they were fired that evening.

Berkley Smith, Jr., was on the road on November 8 and returned with his truck late on that afternoon.[21] He testified that when he went into the dispatch office Sanzalone asked him to take a load to Jersey City. Smith hesitated, then said that he did not want to go to Jersey City, but wanted to go home. He then left. Later that evening he received a call from Gonnella who asked if he was coming in the next day. Gonnella added that if he did not he would be terminated. Smith told him he was not coming in and Gonnella said "all right, then, you know the consequences."

Collie Stradford testified that sometime on November 8 he was informed by Berkley Smith, Jr., that everybody was fired. Stradford called the terminal and spoke to Gonnella. The latter informed Stradford that, in fact, everybody was fired, adding that Spiegel had called, that he was going crazy, and that Spiegel had said that everybody was fired.

[18] My findings in these events are based on the testimony of John Hobbs. I found Hobbs to be entirely credible despite extensive cross-examination on all the issues as to which he testified. Aside from some question about when the list of grievances was prepared, his memory was good, and his demeanor convinced me he was telling the truth.

[19] At another point he admitted telling at least one employee that if he did not come in he "would" be fired.

[20] I do not rely on this conversation to establish Hobbs' status. Valenti was not alleged to be a supervisor, nor was there any evidence that he was.

[21] On his way back to the terminal Smith had stopped by Stradford's house, so he knew what was happening that day.

Other employees had different versions of their experiences in this period of time. Douglas Cleveland testified that he was ready to go to work on November 8, but Gonnella told him to put his truck back in the lot, that nobody was going to work. Clarence Allen stated that he actually did go to work on November 9, then spoke to Gonnella on November 10. Gonnella told him not to go out and he did not go out for a few days.[22] Virnar Williams testified that he had been on the road until November 14. At that time he had signed a union authorization card. He returned to the terminal and met Spiegel and Sanzalone. According to Williams Spiegel asked him if he had signed a card.[23] Williams said, "Yes," and Spiegel then told Sanzalone to put "final pay" on Williams' check. Williams asked Spiegel what they were going to do, and Spiegel said he could do nothing until the matter was settled. Sanzalone denied that Spiegel said to put the words "final payment" on a check, but Sanzalone's testimony was in response to a question about a conversation with Collie Stradford, not with Virnar Williams.[24] Sanzalone did state that he typed the words "final payment" on all the paychecks made out to the employees after the walkout[25] but he denied that this signified that they were terminated. His explanation of why it was done is not so clear. He said that the words "final payment" appeared on the employees' checks because "it was their last paycheck to my knowledge. They were done working and we didn't owe them any money."

Much of the foregoing testimony by the employees, particularly that testimony treating conversations the employees had with Spiegel, Valenti, and Gonnella, is undenied. Neither Spiegel nor Valenti testified at all. Gonnella, who had quit his employment with Respondent 2 or 3 weeks after November 8, was called as a witness by Respondent. He gave his name and address, but refused, on advice of his own counsel, who was present in the hearing room, to answer any other questions. Sanzalone testified that he gave no instructions to Gonnella, or to anyone else, to call employees on November 8 or 9. However, the record shows that by Sanzalone's own admission, Gonnella was in complete command of Respondent's trucking operations, with authority to hire, fire, and discipline employees up to the time of the walkout. The logic of this circumstance would lead to the conclusion that Gonnella was free to act as he chose in this matter unless he was instructed otherwise by Spiegel himself. The only evidence on this latter circumstance is the testimony of Hobbs and Stradford quoting Gonnella to the effect that Spiegel had called, that he was "going crazy," and that he had ordered the discharge of those employees who refused to return to work.

I specifically do not credit Sanzalone's denial that he told Berkley Smith, Sr., and Matthew Spencer that they were fired, and that he did not tell anyone he called on the telephone that they were fired. He was inconsistent and vague in his testimony on this issue, saying at one point that he said Smith and Spencer "would" be fired, and at another point that they "could" be fired. His memory was poor as noted above in his recollection of a conversation with Stradford which actually took place with Williams. He admitted that it was his opinion that if a man refused to work he could be fired. This finding is also based upon my close observation of Sanzalone who spent several days on the witness stand. He impressed me as lacking candor in critical areas and as being a highly suggestible witness both on direct and cross-examination. Further, by his own admission he was unfamiliar with Respondent's operations and business methods for the period before he began his full-time assignment at Harrison. To be sure, the fact that Respondent chose to base its defense primarily on the testimony of this single witness made its defense difficult, if not impossible, but this was Respondent's choice. Spiegel may have been too ill to testify, and Gonnella had his own troubles, but there appears to be no reason why Valenti or Yerkie, identified as a salesman, or DiCola, another dispatcher, could not have testified as to these critical events of November 8 and 9.

I could in these circumstances find that the testimony of these individuals, if they had been called as witnesses, would have been adverse to the interests of Respondent, but I do not have to do so. I find that the testimony of Hobbs, Brown, Spencer, Stradford, Williams, and the Smiths was logical, corroborative, consistent, and credible. Each one of these employees impressed me as candid and forthright. Their stories were logical and consistent even though the witnesses were sequestered throughout the hearing and their stories held up through vigorous cross-examination.

Thus, in the absence of extraordinary circumstances, I find that following the walkout Respondent, through Sanzalone and Gonnella, its agents and admitted supervisors, threatened all of its employees that if they did not return to work they would be fired and then, on their refusal, did in fact fire them. I further find that, in the case of Virnar Williams, he was unlawfully interrogated by Spiegel himself, who on Williams' admission that he had signed a union card, summarily fired him.

Respondent maintains that just such extraordinary circumstances did exist and that its actions, while ostensibly unlawful, were not in this case.

### D. *Respondent's Defense*

As a defense to the charges that it threatened its employees with discharge, and then did discharge them for engaging in the walkout on November 8, Respondent contended:

> [A] number of employees of [Respondent] along with Carmen Gonnella, the dispatcher, an individual at Art Metal U.S.A. and, we believe, someone at the Fidelity Union Trust Company, entered into a

[22] Both Cleveland and Allen testified that they had received threats from other employees on account of their willingness to work. This aspect of the case will be discussed below.

[23] This is alleged in the amended complaint as a separate violation of Sec. 8(a)(1) of the Act. This will also be discussed below.

[24] It is not surprising that Sanzalone, who spent several full days on the witness stand may have been confused, but this incident does reflect on his memory, and indicates a suggestibility as to questions propounded by Respondent's counsel.

[25] This fact was also stipulated by the parties.

conspiracy to defraud [Respondent] by making deliveries of Art Metal Products that . . . were assigned to [Respondent] for delivery, using Spiegel equipment and their own tractors or Spiegel tractors, in instances, using Spiegel rights, and then billing Art Metal under the name of Truck All Cargo, which is a non-existent company, getting paid by Art Metal and cashing these checks at the Fidelity Union Trust Company, and dividing up the cash between the drivers and the other persons involved.

We further contend that when the company suspected that there was a pilfering of income and instituted the work report forms the employees realized that by completing this form their operation would either have to cease or they would be found out if they attempted to do it because of the checks relating where the employee was to the vehicles that were being utilized, and that through the disguise of alleged work stoppage (on November 8) attempted to prevent the company from putting in this work rule so as to perpetuate the conspiracy and embezzlement that had been going on.

And it is our contention that whatever activity they engaged in for that purpose is unprotected activity, since its object, we contend, which is the reasonable inference to be drawn from the evidence we will produce, is that it was for unlawful purposes. Their objective was to prevent a reform to coverup an unlawful purpose.

And we contend that whatever activity they (the employees) engaged in is unprotected activity under the Act, and that whatever actions the company took are not unlawful in terms of a violation of the National Labor Relations Act, since the Act extends only to protected activity and the commission of a crime is not a protected activity.

And we contend also that other employees who normally would come to work with no obligation were threatened and coerced by these other employees into remaining out of work by fear and threat imposed upon them.

With no objection from the General Counsel, or counsel for the Charging Party, I allowed Respondent to amend its answer to introduce this as an affirmative defense.[26] In addition I allowed, over the strenuous objections of the General Counsel and counsel for the Charging Party, a great deal of evidence which was characterized as incompetent and irrelevant, and some which by any standards must be considered as hearsay. It was my view then, as it is now, that the gravity of these allegations, pointing as they did to what was said to be corruption at the very foundations of the proceeding we were engaged in, and broadly charging that the affiliation of these employees with the Union, and the subsequent processing of charges by the Board were all tainted by a fraudulent and criminal scheme required at least that Respondent be given the broadest latitude. Thus I felt, and feel, that it was important to allow certain basic facts to be placed in the record, in some cases *de bene*, in order to give Respondent the fullest possible opportunity to tie up these basic facts with specific instances and positive, probative, evidence of the alleged wrongdoing.

The evidence on Respondent's defense shows that in the course of its business dealings with Art Metal, Respondent undertook to transport office furniture to a warehouse and receiving center maintained by the Federal Government's General Services Administration (GSA) in a place called Bengies, Maryland. As I have noted above, Respondent employed two drivers whose duties included the spotting of trailers loaded at Art Metal's facility, and the transmission of the bills of lading and other papers concerning the trailer and its contents to Respondent's dispatcher. The dispatcher would then schedule the trailer to be delivered,[27] and on the day before, would assign a driver, placing his name, destination, and trailer number on a dispatch sheet. On the next morning the assigned driver would pick up his tractor and the documents representing the trailer load of furniture. These documents consisted of weigh bill, or pro bill, a document made out on a printed form at Art Metal showing the name of the consignor, Art Metal, the consignee, GSA,[28] the destination, Bengies, Maryland, the carrier, Spiegel, and a description of the goods covered by the weigh bill.[29]

The practice of Respondent was to retain one copy of the weigh bill, which was given to the bookkeeping department to be retained in an open file for billing on completion of the delivery. Three additional copies were given to the driver together with the seals for the trailer.[30] The driver then proceeded to Art Metal, picked up his assigned trailer, and drove to Bengies.

On arriving at the GSA warehouse, the trailer would be unloaded by GSA employees, one of whom signed the weigh bills. The bills were brought into the receiving office by the driver, where the bills were stamped with a GSA stamp. One copy was retained by GSA in its files and the other two returned to the driver. In addition, GSA employees entered in a receiving register the name of the carrier, the date of the delivery, the time consumed in unloading, the driver's name, the type and amount of merchandise, and the weigh bill numbers included in the shipment.

On completion of the delivery, the driver would return to Harrison and turn in the two signed, stamped, weigh bills to the dispatcher. While the testimony does not specifically pinpoint the subsequent processing of the bills, it is clear that at least one of them would be sent to bookkeeping to be matched up with its duplicate in the

[26] The hearing was recessed from July 10 to August 6, 1979, in part to allow Respondent to develop this defense.

[27] On deliveries to Bengies, Maryland, GSA required that they be made by appointment so that the warehouse personnel could handle them more efficiently.

[28] The same procedure would probably take place with other customers of Respondent, but Art Metal and GSA were the only entities discussed in detail here.

[29] Sometimes there were several separate orders in one trailer and each order would be represented by a separate weigh bill, and on other occasions, a large order could occupy more than one trailer.

[30] These seals would presumably be attached before the trailer would be permitted to leave Art Metal's premises. There was no testimony on this but it is not important to a determination of the issues herein.

open file, and then billed to Art Metal. One copy of the weigh bill was retained in Respondent's permanent files.

At the same time as he received the bills, the dispatcher would note the delivery on what was described as a "scrap" of paper which would be then used to compute the driver's pay for the day.

While his testimony was not always clear and while his sources of information were not always given, Sanzalone testified, credibly enough, that on his move to Harrison on a full-time basis in October 1978, he became concerned because Respondent's revenues did not match what he considered to be an adequate level based on the amount of business being done. He inquired about this to the bookkeeper, Vicky Brandt, and was told to mind his own business. On further inquiry Gonnella told him that this was the way Spiegel wanted things run. There is no evidence that Sanzalone discussed the matter with Spiegel, but he did take one step, the installation of the work report forms, which, as he said, would give him a more accurate picture of the daily trucking operations. It is not disputed that Gonnella, as well as a number of employees were angry and upset about the imposition of the work report requirements, but Sanzalone went ahead and posted the notice and the work report form on November 2. It is further undisputed that Sanzalone was unaware at that time of any fraud, or of the involvement of Gonnella, or anyone else, in a widespread scheme to misappropriate money from Spiegel's operations.

It is, additionally, not clear what further investigative measures Sanzalone took, or what led him to inquire in any area, but the results of his investigation, which was still under way at the time of the hearing in this case, were entered into evidence through his testimony and by certain documents,[31] showing that Spiegel was in fact defrauded of large sums of money over a period at least from May to August 1978.

This evidence showed that a number of weigh bills on file at the GSA warehouse in Bengies, Maryland, indicated that shipments of merchandise from Art Metal were brought there by Spiegel trucks, driven by Spiegel employees during this May-August period. Mary Mohr, a receiving clerk at the GSA warehouse, identified a large number of such bills, and their authenticity was not questioned.

On these bills, Sanzalone testified, a number were missing from Respondent's files. Sanzalone had obtained, and introduced into evidence, a number of documents which had been obtained by Spiegel from one Irving Cooperstein, the treasurer of Art Metal.[32] These documents showed that, instead of Spiegel weigh bills, stamped and showing date and time of delivery, together with a Spiegel invoice for the delivery, there was a weigh bill, or bill of lading, from an entity called Truck All Cargo, together with an invoice from that company. The documents submitted by Sanzalone also matched up the shipments shown by the GSA copies of the Spiegel weigh bills, containing the date and time of arrival, and the contents of the shipment identified by the order number and quantity of pieces with weigh bills submitted by Truck All to Art Metal showing identical information.

The Truck All weigh bills and invoices submitted to Art Metal were approved for payment by Joel Nagel, the traffic manager for Art Metal. The invoices were then paid by checks from Art Metal to Truck All Cargo. The checks, in turn, were cashed, bearing only the endorsement "Truckall Cargo," at the Port Newark branch of the Fidelity Union Trust Company.[33]

It may be seen, from this broad outline, that the actual fraud consisted of the replacement of the stamped and receipted weigh bills showing delivery to GSA of the Art Metal merchandise; the replacement of these weigh bills by forged bills bearing the name of Truck All Cargo; and the submission of the forged bills, together with invoices, to Art Metal. In these circumstances there are strong indications that Gonnella, who refused to testify in this proceeding on advice of his own attorney, who was present, and Nagel, who invoked his privilege against self-incrimination in this proceeding, were participants in the fraud against Respondent. The bookkeeper, Vicky Brandt, who resigned in mid-October, was not called to testify here, and may or may not have participated in the fraud.[34]

I am not concerned with the fraud itself or the implication of these individuals in it. These are really matters for another forum. However, Respondent has made the claim that at least some of the drivers whose actions and interests are bound up in this case were participants as well in the scheme; that these drivers feared that Sanzalone's work reports would halt, or even expose, this fraudulent activity; and, that this fear of exposure directly led to the protests over the imposition of the work reports on and after November 2, and to the walkout of November 8. Respondent further claims that those employees who were not involved in the fraudulent scheme

[31] These documents, Resp. Exhs. 15(a-o), were received in evidence but not submitted by Respondent to the court reporter. Repeated requests to Respondent's counsel to submit the documents have been unavailing. However, I read the documents at the hearing, and I have credited the material found therein in making these findings. Respondent is not prejudiced by its own failure to produce this material.

[32] The General Counsel objected to the introduction of these documents on the grounds of hearsay. However, there is no evidence that these documents were not copies of documents in the files of Art Metal, and the circumstances indicate to me that, in that respect, they are trustworthy. Under these circumstances it is not necessary that the person who maintained the records testify on them. *United States* v. *Edward L. Flom, etc.*, 558 F.2d 1179 (1977).

[33] In addition to the materials dealing with Art Metal, Respondent offered testimony and a number of bills of lading concerning other fraudulent operations involving shipments of foam pads and other materials originating at a company called Delaware Valley, located in Lawrence, Massachusetts, and destined from Art Metal. I rejected the proffered exhibits on the ground that some were illegible. I reaffirm that ruling at this time, with the additional reason that the trustworthiness of these documents has not been established. Further, in view of my disposition of this aspect of the case, I do not find it necessary to consider the Delaware Valley connection, since it is based almost entirely on hearsay. No representative of that company appeared at this hearing and the documentary evidence, as noted above, has been rejected.

[34] Brandt apparently went to work for a company named Taurus Trucking Company after leaving Respondent. Gonnella also went to work for Taurus after quitting Respondent in mid-November. There are indications in the record that Respondent considered Taurus to be connected with the whole fraudulent scheme, but no probative evidence of this was introduced herein.

were bullied and coerced into joining the protest and walkout through threats of violence and retaliation from the guilty participants.

As I pointed out to Respondent's counsel at the hearing, his burden of proof in respect to these theories was formidable. In the light of the entire record on this issue, I cannot find that he has met this burden.

Initially, I note that two of the premises on which Respondent's theory are based are not demonstrated to be true by the evidence. The first of these is that the November 8 walkout was caused by the work report forms. The facts are undisputed that the meeting of the employees on the morning of November 8 was prompted by a number of grievances. Even admitting that the institution of the work reports was the touchstone, and the primary grievance, the facts show that it was not the grievances, but the absence of Spiegel, and Sanzalone's refusal to contact him on that morning, which was the immediate cause for the walkout. It is undenied that the employees agreed among themselves that they would walk out and that they would not return until Spiegel returned and spoke to them.[35]

A second basis for Respondent's defense which has not been proven is the assertion that the walkout was forced upon innocent employees by the threats of the guilty. The evidence concerning the events of the morning of November 8 reveals no testimony or evidence of any threats by anybody. There is testimony about threats, but that occurred later, only after the walkout had already taken place.

Apart from these fundamental matters which go to the heart of Respondent's case, there is no convincing evidence that any of Respondent's drivers participated, or even knew about, the scheme. Looking first at the Spiegel weigh bills which were retrieved from the GSA records, there is no question but that various employees including Chandler, Biggins, Brown, and Stevens, actually delivered merchandise, in Spiegel trucks, which merchandise was later described on Truck All bills and invoiced by Truck All to Art Metal. Respondent introduced dispatch sheets showing employees, such as Chandler, as being booked off on the same day that they appear on the GSA records as having delivered a load for Spiegel at Bengies, Maryland. On other dispatch sheets, employees are shown as being assigned to one place, while other evidence submitted by Respondent shows them to have been at another location.[36]

The evidence also shows, however, that the dispatch sheets were composed and maintained solely by the dispatcher, Carmen Gonnella. In the circumstances I find that I cannot rely on these dispatch sheets as an accurate guide to the whereabouts of any employee on any particular day. Indeed, I pointed out during the hearing that corroborative evidence, such as payroll records, should be brought in to verify whether or not employees were paid by Spiegel for work which other documents showed was included in the fraud. These records were not produced, even though Sanzalone did testify as to what he claimed some of these records showed. In the absence of the payroll records I do not credit Sanzalone's generalized and conclusionary statements purportedly based on those records.

There is, further, no probative evidence that any driver knew of or participated in the scheme to defraud Respondent. Sanzalone did testify that Vander Ezzell, a driver, had told him of widespread participation by drivers in the scheme, but Ezzell did not testify in this hearing. Respondent argues from the negative point of view that I should discredit the testimony of Collie Stradford and that I should infer and find from this, and from the failure of Ezzell and several others to testify, that the employees did participate in the fraud and that this participation led to the protest and walkout of November 8. Aside from the fact that I found Stradford to be a credible witness, I cannot make the inferences requested since there was no showing that the employees named by Respondent, Ezzell, Leroy Chandler, Willie Biggins, Sterling Campbell, and Joseph Stevens, were unavailable, or could not have been summoned by Respondent to testify herein.[37]

Moreover, it appears from an analysis of the entire scheme that it could have functioned without any participation by the drivers. The key participants were Gonnella and Nagel and the whole thing was a paper transaction, involving the substitution of perfectly legitimate weigh bills, obtained by the drivers in the normal and proper course of their duties, with fraudulent bills, which were then approved for payment at Art Metal. While there may be suspicions raised as to the involvement of drivers, it would seem that the scheme could have worked without the knowledge or cooperation of the drivers and, in fact, might have worked better without that knowledge or cooperation in that the risks of exposure would be minimized and the proceeds of the fraud could be more closely retained.

Therefore, while Respondent has certainly shown the existence of a fraudulent scheme involving considerable losses in revenue over an extended period of time, it has not shown that any employees knew of or participated in that scheme. Respondent has further not shown how the initiation of work report forms would have interfered with the operation of the fraud; or that the work report forms were the cause of the walkout on November 8; or that threats of violence even occurred prior to or during the early stages of the walkout. In accordance with these findings, Respondent's defense is rejected.

### E. *Summary and Conclusions on the November 8 Incidents*

While the most significant contributing factor to the walkout of Respondent's employees on the morning of November 8 may have been the November 2 notice re-

[35] I note that despite the fact that this demand was made clear to Sanzalone on November 8 there is no evidence that Spiegel ever made any effort to speak to the employees after his return sometime before November 14. Spiegel's reaction is described above.

[36] Much of this latter evidence concerns the Delaware Valley aspect of the operation. As noted above, I find that evidence to be too unreliable on which to base findings.

[37] The testimony of Virnar Williams and Ernest Gause to the effect that they had been paid by Gonnella, Taurus, and one Izzy Weisberg, is not persuasive that there was any pattern or practice among drivers to accept pay from others for Spiegel work.

quiring the preparation and submission of work reports, I have rejected Respondent's defense based in part on that consideration, and I conclude and find that the employees had a number of other complaints, some generalized, such as the attitude of the mechanics, some specific, such as driver facilities, and that the total of all these grievances impelled the employees to ask for a meeting with Spiegel. The gathering of the employees on the morning of November 8, their meeting with Sanzalone, and their subsequent walkout were all protected concerted activities entitled to the protection of the Act.

The subsequent actions of Gonnella and Sanzalone and of Spiegel himself, discharging some employees directly, in threatening some with discharge if they continued to engage in what I have found was protected activity, and in directing that the words "final pay" be placed on checks due to employees,[38] I find to be directed by Spiegel and to be violations of Section 8(a)(1) of the Act. *Crenlo, Division of GF Business Equipment Inc.*, 215 NLRB 872 (1974).

In addition, I find that the separate interrogation of Virnar Williams by Spiegel on November 14 constitutes an independent violation of Section 8(a)(1), and Spiegel's discharge of Williams after he had admitted he had signed a union card, was a violation of Section 8(a)(1) and (3) of the Act.

### F. *The Interrogation of November 8*

On Saturday, November 18, Berkley Smith, Jr., received a call from Sanzalone in which the latter asked if Smith would come down to Respondent's office. Smith agreed, and when he arrived, Spiegel took him into his office and said that he wanted him to go with him to his lawyer's office to make a statement. Spiegel told Smith that he did not have to lie, and did not even have to go if he did not want to. Spiegel did not say that nothing would happen to Smith if he did not go. Smith agreed, and they went to the office of Attorney John Craner in Springfield, New Jersey. The group included Spiegel and Smith, together with DiCola, a dispatcher, Sussman, Spiegel's partner in I & L Trucking, Kenny Yerkie, a salesman, and drivers Allen, Cleveland, and Braime.

When they arrived at Craner's office, Spiegel told them that he wanted them to make statements and did not want them to lie. He also said that the statements would be confidential, then, speaking to Smith privately, mentioned his coming back to work on the next Monday. All of the people who were there then went into a large conference room and Craner, without any further preliminaries, began taking statements, beginning with Sanzalone. After this he proceeded to take statements from the drivers including Smith. Smith made his statement. Craner asked him about his knowledge of the Union on November 8 and about his involvement with the walkout and the Union. Smith indicated in his testimony that he was not candid with Craner on these questions because he was afraid that he or other employees might not get their jobs back if he answered truthfully. Smith did sign his statement when he was finished.

Clarence Allen also testified about this interview, in rather general terms, but consistently with Smith's testimony. Craner did not testify.

On the basis of this undenied testimony, and my previous finding that Berkley Smith, Jr., is a credible witness, I find that the incident on November 18 occurred substantially as Smith described. It is evident from this testimony that neither Spiegel nor Craner informed the employees who were asked to come to this interview that there would be no reprisal against them for their refusal to participate or cooperate. Smith confessed to his real fear that, if he told about his union involvement, reprisals would be taken against him and other employees. The questioning occurred in an atmosphere suffused with hostility toward the employees' concerted activities and their subsequent enlistment in the Union. Thus, I find that these interrogations coerced and restrained Smith and the other employees in the exercise of their rights under the Act. *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*, 146 NLRB 770 (1964). There is no indication in the testimony that Spiegel himself interrogated employees about their union activities on this occasion. Yerkie, who did ask Smith a question about a conversation he had concerning the Union, was not shown to be an officer or agent of Respondent. There is no question, however, but that Craner did interrogate Smith about his union activity, which I find to be a further violation of Section 8(a)(1) of the Act.

### G. *The Offers of Reinstatement*

#### 1. Conversion of the walkout to an unfair labor practice strike

The actions of Respondent, through Gonnella and Sanzalone, initially, in threatening employees with discharge if they did not abandon their walkout, and in discharging those who did not and who said that they would not return to work; and later by Spiegel himself, who, when informed of an employee's union activity, peremptorily discharged him by ordering the words "final pay" written on his check, converted the economic action of the employees into an unfair labor practice strike. *N.L.R.B.* v. *Pecheur Lozenge Co., Inc.*, 209 F.2d 393 (2d Cir. 1953). All of the striking employees, would, then, be entitled to reinstatement on and after November 8 without any unconditional offer on their part to return to work. *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979).

#### 2. The unconditional offer to return to work

On November 15, John Frantantoni, the Union's business agent wrote to Spiegel notifying him of the Union's

[38] I find this action clearly manifested an intent to discharge all of the employees who received the checks. Since the parties stipulated that all the checks paid to employees contained those words, it follows that all of Respondent's employees were discharged for their protected activities. *C & W Mining Co., Inc. and/or C & W Hauling Co., Inc.*, 248 NLRB 270 (1980). I make this finding despite the fact that the amended complaint alleges only that Respondent discharged four employees on November 9, and five more on November 13. The matter was fully litigated and Respondent is not prejudiced by this finding. I find further that Ramon Ortiz was not an employee of Respondent at the time of the discharges (see fn. 50, below) and that Clarence Allen testified that he neither went on strike, quit, or was fired, but continued to work except for a day or two. I find that he was not, in fact, discharged.

claim of majority status and stating that "the Employees make an unconditional offer to return to work at their regularly scheduled work time on November 15, 1978." I do not have any question about the authority of the Union to make this offer on behalf of the employees. The record makes it clear that a majority of the employees had authorized the Union to represent them for purposes of collective bargaining, as will be more fully discussed below. Further there is no question which appears in the record as to any limitation of this offer to acceptance on a single day, here November 15. It is apparent from the testimony that the letter, even though it is dated November 15, was in fact handed to Spiegel on November 14 when Frantantoni called on him in his office. Spiegel's reaction to this part of the letter is not known since neither Frantantoni nor Sanzalone, who also testified about the November 14 meeting, indicated what his attitude was on the question of reinstatement.

However, Frantantoni's intent, as revealed by his testimony, was that this was an unconditional offer to return. Therefore, in view of the fact that Spiegel raised no question about the unconditional offer at that time or later, I find that the offer was in fact unconditional, and that the strikers' entitlement to reinstatement runs from that day forward. *N.L.R.B.* v. *Thayer Company and H. N. Thayer Company*, 213 F.2d 748 (1st Cir. 1954).

3. The November 18 offer of reinstatement

On the evening of November 18, after the meeting between Attorney Craner, Spiegel, Sanzalone, and employees in Craner's office, Respondent caused to be prepared and sent out a telegram bearing the following message:

> We are hereby offering you a job with Spiegel Tkg. Co. as a driver. You are directed to report to the terminal at 7:00 a.m. Monday 11/20/78
>
> Spiegel Tkg. Co.

These telegrams were sent by Respondent to drivers who were considered employees. None were sent to persons described by Respondent as owner-operators. They were sent to the addresses given in Respondent's records as the addresses of the employees to whom the telegrams were sent. There was a great deal of testimony on the record of this case about telegrams sent to the wrong places, telegrams not received, or received too late to respond to the offer. There was also inquiry at great length into the motives of employees in not responding to this offer. All of this, I can now see, was really irrelevant, since the telegram itself was fatally defective as a lawful offer of reinstatement. The fact that it was sent on a Saturday night, November 18, requiring employees to report on Monday, November 20, does not constitute an adequate good-faith offer of reinstatement. *Freehold AMC-Jeep Corporation*, 230 NLRB 903 (1977). In addition, on its face the telegram is not an offer of reinstatement at all, but merely an offer of "a job with Spiegel Tkg. Co." I thus find that this telegram did not constitute a valid offer of reinstatement to any striking employees.

4. The January 27 offer of reinstatement

On January 27, 1979, Respondent caused another telegram to be prepared and sent to all of its drivers, including the owner-operators, who had not returned to work by that time, reading as follows:

> Dear Sir:
>
> You are hereby unconditionally offered the opportunity to resume your employment with Spiegel Trucking by reporting for work on Monday, 1/29/79, at 7:00 a.m. This is a continuation of the prior offer of re-employment made to you on November 18, 1978. If you do not respond to this offer by Friday, February 9, 1979, we will presume that you are no longer interested in your job with us and we will consider you as terminating your employment with us.
>
> Spiegel Trucking
> William Sanzalone
> General Offices Spiegel City
> Cape May St. Harrison NJ

Unlike the November 18 telegram, this one appears on its face to be a valid offer of reinstatement. It offers not a new or undefined job, but the individual's former position, and it is not so limited as to the time for response as to render it invalid under the cases cited above. However, the General Counsel contends that as a matter of fact the offer was not valid because Respondent had, in the time since November 8, substantially altered the terms and conditions of employment, and that the jobs to which the employees were asked to return were not the same jobs at all.

In order to understand this argument it is necessary to set out the employment conditions as they existed before the walkout and then compare what was offered to the returning strikers.

Prior to November 8 Respondent employed drivers in two different categories. Those in the first category were considered employees by Respondent. They were paid a flat rate of $42 per day together with what was described as a "bonus," in increments of $10, for performance of additional work.[39] In addition, these employees received vacations, paid holidays, hospitalization, and a pension program.[40] Respondent carried insurance, including workman's compensation, for these employees, and supplied all equipment necessary for them to perform their duties.

The other category of drivers was referred to throughout the hearing as that of "owner-operator."[41] These

[39] This work largely consisted of moving additional trailers or loads. Since most of those employed as salaried drivers worked locally they could earn bonus money by completing their day's assignment quickly and then take on extra jobs to earn the bonus. These payments could run up to $50 or more per week.

[40] Collie Stradford testified that deductions were made from his pay for the pension plan, but Spiegel never gave him an accounting for the money, nor was there any records of such payments in his tax withholding form.

[41] This category will be discussed more fully below in my consideration of the appropriate unit.

drivers either owned their own tractors or were in the process of purchasing tractors from Spiegel or from some outside source. They were compensated for hauling Spiegel trailers on the basis of 62–1/2 percent of the revenue received for the particular delivery. They received no other compensation for this, covering all expenses including truck maintenance, cost of fuel, tolls, and other costs themselves. They received no holidays, vacations, pension, hospitalization, or other benefits, the only insurance other than cargo insurance carried by Respondent being workmen's compensation.

These two methods of compensation were, I find, the only alternatives in effect prior to November 8.[42]

Following the strike, Sanzalone testified, each employee who came back was offered a position as an owner-operator, if he owned or was buying a tractor or, in the alternative, a position as a driver, either compensated on the old $42 plus bonus method, or as what was referred to in the hearing as a "lease-operator" position, whereby Spiegel would furnish the tractor as well as the trailer, but the employee would pay all other expenses and costs, and receive no fringe benefits, as in the case of owner-operators, receiving as his compensation 30 percent of the revenue produced by his efforts.

Sanzalone stated that a number of employees returned to work in accordance with the offers of reinstatement. He stated that Chris Miller and Douglas Cleveland returned on November 20 to the same positions they had held before November 8. However, Miller did not testify and Cleveland, although he was called as a witness by Respondent, was not asked about his conditions of employment either before or after the strike. Sanzalone testified that Clarence Allen had worked as an owner-operator before the strike and that he returned on November 22 in the same status. This was corroborated by Allen, but Allen also said that he could not make enough money at that, so he sold his truck back to Spiegel and thenceforth worked as a lease operator. According to Sanzalone, Vander Ezzell, who had previously been an owner-operator, came back on November 22 as a lease operator. Ezzell did not testify. Thomas McCue returned on November 28. Sanzalone stated that his job had been eliminated, but he was put on an equivalent job at the rate of $42 per day plus bonus. McCue was called by Respondent to testify but he was so hard of hearing that it was impossible to question him orally and he was excused by agreement of the parties. The last employee to return before January, according to Sanzalone, was Jose Santiago, who came back on November 30. Sanzalone testified that Santiago had been an employee driver before and returned on the same basis. Santiago was called as a witness by Respondent, but was not asked anything about his employment status either before or after the strike.

After the second telegram, a number of employees did return to work, or contacted Respondent as a result of the message contained in the telegram.

John Hobbs, who I have found throughout to be a credible witness, testified that he called Spiegel on the telephone on February 6 or 7, after unsuccessfully trying to see him at the office. Hobbs asked Spiegel if he was to go to work. Spiegel replied that he was now paying a base pay of $210 per week. Hobbs said that he had been making $350.[43] Spiegel then said that this was all he was paying now, adding that all he had to do was to offer Hobbs his job and that he was not going to argue with him. Spiegel then told Hobbs that the first day he was out he would be fired, the first day he was late he would be fired, and that whatever he told him to do that was what he did. Hobbs did not return to work.[44]

Matthew Spencer testified that he had worked as an owner-operator before November 8 and that he continued to run his own truck until it broke down about a month later. He then went to Respondent's office and spoke to Sanzalone about coming back. Sanzalone told him he would be driving a Spiegel truck for 30 percent of the revenue. He returned under those conditions, but had quit some time before the hearing in this case.

Berkley Smith, Sr., and Berkley Smith, Jr., were both salaried drivers before the strike. Each of the Smiths testified that they returned to work about a month after receiving the second telegram. They went separately to Respondent's office and talked to Sanzalone. Smith, Sr., stated that Sanzalone told him the compensation would be 30 percent of revenue, and Smith, Jr., said that Sanzalone stated that the "pay would be different," it would be 30 percent of revenue and there would be no more day's pay.

Collie Stradford stated that he had been a salaried driver before the strike, but because he had a heart condition he was not required to handle heavy loads. Stradford also performed other duties such as switching trailers, messenger work, and acted as a chauffeur for Spiegel himself from time to time. When he received the second telegram Stradford went to the office and talked to Spiegel. The latter told him that "this is all a new ball game." He stated that the salary was $210 per week and that the bonus was out. Spiegel further said that Stradford would now be required to unload his truck (which he had not done before the strike) and if he did not he would be fired. Stradford said he could not accept this.[45]

[42] I specifically do not credit Sanzalone's statement that some employees, including Virnar Williams and Joseph Stevens, were working under different conditions prior to November 8. Both Williams and Stevens testified, credibly, that they were employed as owner-operators before November 8 and Respondent introduced no other evidence of the existence of a third method of payment before the strike.

[43] Payroll records submitted in evidence verified this assertion.

[44] Hobbs admitted that Craner had approached him at a hearing on unemployment compensation sometime later and told him he could go back to work. Craner, however, said nothing about money and, since Hobbs had never seen Craner before, he did not know whether this was a legitimate offer. I cannot find that this brief conversation in another forum constituted a valid offer of reinstatement.

[45] Sanzalone testified that Stradford also said that he wanted a job with no work and when Spiegel came around he would "look busy." However, Sanzalone did not deny the fact of the prior conversation between Spiegel and Stradford. Apparently Sanzalone was somewhat confused, since he denied that Stradford was offered a job and, in the next breath, said he was offered the same rate of pay he had received before the strike. I do not credit Sanzalone's version of the conversation with Stradford.

James Morrison had been a salaried driver before the strike. He testified as to a conversation with Spiegel and Sanzalone after receiving the second telegram. Spiegel told him that he was not sure what his job or salary would be. He told Morrison that the salary was $210 per week but that the bonus had been cut out, it was an entirely new ball game, and that they were running the system "altogether different now."

Ernest Gause was called as a witness by Respondent. He testified that he had been an owner-operator both before and after the strike.

Clarence Allen, also called as a witness by Respondent, similarly testified that he was an owner-operator before and after the strike. He stated that some time after he returned to work he sold his truck back to Respondent and then worked on "percentage."

Virnar Williams was an owner-operator for 2 years but about 2 weeks before the strike his truck broke down and Spiegel "took the truck back." Williams then worked on the salary and bonus until the strike. He returned to work on the day after Christmas. Sanzalone informed him that he would be paid on a percentage of revenue and he signed an agreement to that effect.

David Brown had also been an owner-operator but at the time of the strike he was a salaried driver. Although he, too, was called as a witness by Respondent, he testified that he called Respondent's office in the last week of December, then went down and talked to Spiegel and Sanzalone. They told him he would be a "lease operator," and he returned in that status.

I have found the testimony of Hobbs, Stradford, Williams, and the Smiths to be generally credible, and I so find their statements here. Sanzalone's testimony makes it clear, and he himself admitted, that Respondent made a decision at or around the time of the November 8 walkout to change its method of compensation for its employees to a percentage system under which there would be no deduction for taxes, social security, health insurance and pensions, and no fringe benefits. Sanzalone likewise admitted, although he later recanted, that this percentage, lease operator, system was imposed on all of the returning strikers. His testimony that several employees were returned and were working on the salary plus bonus was uncorroborated.[46] I do not credit Sanzalone in this matter and I find, in accordance with the testimony of the employee witnesses, that some employees were told that if they returned they would do so as lease operators on the basis of 30 percent of the revenue they produced. Others were told that they could come back on salary, but that salary was the same as they had previously earned, less the bonus system which had been eliminated. Further, two employees, Hobbs and Stradford, were told that Respondent would impose harsh and restrictive rules of conduct on them.[47] It is not clear from the evidence whether the 30 percent equaled or exceeded the $42 plus bonus and fringe benefits which had been paid before,[48] but it is clear that those fringe benefits were no longer available under this new system. There is no question about the fact that $42 without the bonus is substantially less than $42 with the bonus.

There is, further, no substantive evidence that jobs were eliminated because of the strike or that any legitimate and compelling economic justification existed for offering the strikers less in the way of pay and benefits than they had received before the strike. Sanzalone did claim that Hobbs had been replaced and that the jobs previously performed by McCue at Art Metal, and by Stradford at the United States Lines pier had been eliminated due to a loss of business. These assertions were unsubstantiated by any documentary evidence and, in the case of the United States Lines job, were denied by other employees who testified that work was still going on there. I reject these claims by Sanzalone and find that there was no business justification for the reduced wages and benefits offered the returning strikers.

In view, then, of the reduced wages, elimination of fringe benefits, and the promise of stricter work rules, I find that the purported offer of reinstatement of January 27, 1980, was ineffective and unlawful. *Albion Corporation d/b/a Brooks, Inc.*, 228 NLRB 1365 (1977).

### H. *The Refusal To Bargain*

#### 1. The Union's majority

As I have noted above, the employees who walked off the job on the morning of November 8 gathered at Stradford's house, then sent a deputation to the Union's offices. Several of these signed authorization cards for the Union at the Union's offices. They returned to the house with more cards, which were signed by many of those employees then and there.

John Hobbs testified that he personally observed the signing of cards at the union office and at Stradford's house. The employees who signed at the Union office on November 8 were: Collie Stradford, Leroy Chandler, James Morrison, and Ernest Gause. The employees observed by Hobbs as signing cards at Stradford's house on that day were: Willie Biggins, Joseph Stevens, James Braime, McKinley Young, David Brown, Matthew Spencer, Sterling Campbell, Jose Santiago, Douglas Cleveland, Chris Miller, and John Hobbs. The following employees were observed by Hobbs as they signed cards on November 11 at Stradford's house:[49] Berkley Smith, Jr., and Virnar Williams. Collie Stradford testified that he observed the following employee sign his card at Stradford's house on November 8: Thomas McCue. The following employee identified his own card: Berkley Smith, Sr.

Hobbs testified that two other employees were present at Stradford's house on November 8 but that he did not personally observe them sign their cards. At the hearing I rejected the offer of these cards in evidence through

[46] Even in this instance it is evident from Sanzalone's testimony that the bonus arrangement was different for returning employees than it had been before the walkout.

[47] Sanzalone testified that prior to the walkout employees were not disciplined at all. Unlikely as this seems, it may be explained by noting that Sanzalone was not physically on the premises until shortly before the walkout. In any event, there is no evidence of restrictive or severe discipline before the walkout.

[48] It is highly improbable that this change was intended to the economic benefit of employees rather than of Respondent.

[49] Williams testified that he signed his card on November 14.

the testimony of Hobbs. One of these cards, that of Clarence Allen, was later identified by Allen himself and was then received. The other, that of Leroy Allen was not further identified. The General Counsel in her brief requests that I reconsider my ruling made at the hearing. Her request has merit and I now reverse that ruling and I receive that card (G.C. Exh. 3(t)) into evidence. *Henry Colder Company*, 163 NLRB 105 (1967); *Rapid Manufacturing Company*, 239 NLRB 465 (1978), reversed and remanded 612 F.2d 144 (3d Cir. 1979).[50]

There was no evidence that these cards, or any of them, were coerced, or were obtained by threats of violence. The only firm testimony concerning threats was that of Clarence Allen, who stated that he was told by Willie Biggins that if he took his truck out, "they" would stop him if they had to use violence. Allen did not follow this advice and continued to work until he was told by Gonnella not to go out in the face of threats. Allen then did not work for a "couple of days." The only other references to threats or violence occurred in the testimony of Douglas Cleveland, who said that some unidentified person had called him and said he would be hurt if he went back to work; and Jose Santiago, who testified that he was afraid, but no one had said anything to him about not going to work. None of this evidence touches on the legitimacy of any of the authorization cards. Even Allen's testimony shows that he signed the card at Stradford's house before the threat was made to him.

It thus appears, and I find, that a total of 19 cards were executed on November 8, and another two on November 11, and that these cards were freely executed without restraint and coercion by the individual employees.

### 2. The demand for recognition

As mentioned previously, John Fantantoni spoke to Spiegel and Sanzalone. Frantantoni handed Spiegel a letter which was addressed to "Mr. Spiegel" and asserted that the Union had been selected by "a majority of your Employees employed as Drivers, Warehousemen and helpers" as their bargaining agent as to "wages and other terms," and demanding that Spiegel "recognize it [the Union] as such." The letter further stated that the Union was willing to submit its proof of majority to an impartial third party for verification, together with reference to the employees' unconditional offer to return to work discussed above.

Spiegel looked at the letter and, according to the undenied and credible testimony of Frantantoni, said that he was not going to recognize the Union, and continued, "You do what you have to do; I'll do what I have to do and you got to understand that, you know, all these guys are winos and drunks and I'm just keeping them on the payroll just to make them earn a living. I don't need this kind of aggravation. I know a lot of people. I've got a lot of money . . . . I don't need all this; I could just, you know, get rid of the whole thing . . . ." Frantantoni said, "okay" and got up and left.

Following this meeting, on November 29, the Union's counsel, Albert G. Kroll, sent a letter addressed to Spiegel Trucking Company, attention Isadore Spiegel, advising him that "Local 863's demand for recognition as the majority representative of your truck drivers is a continuing demand." There was, apparently, no reply to this letter.

If there was any question in the initial demand concerning the scope of the unit sought, that question certainly was answered by the precise definition in the November 29 letter. In any event, a request for bargaining need follow no specific form or be made in any specific words so long as there is a clear communication of meaning and the employer understands that a demand is being made. *Joy Silk Mills Inc.* v. *N.L.R.B.*, 185 F.2d 732 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951). This communication and understanding must be determined from a review of all the circumstances. Statements and acts of the union cannot be viewed in isolation and events both prior to and subsequent to the request by the union may be examined in making that determination. *N.L.R.B.* v. *Scott & Scott*, 245 F.2d 926 (9th Cir. 1957). Here there is no question for whose account the demand for recognition was being made on November 14. Respondent was well aware at that time of the identify and functions of those who had gone out on strike. If there could possibly have been any confusion over the definition of the unit, particularly after the November 29 letter, no question was raised by Respondent at that time, or at the instant hearing, or in its post-hearing brief.

I find, then, that the demand for recognition made on November 14 was clear and unequivocal and that Respondent was aware at that time that a claim for recognition in a unit composed of the striking employees had been made. *N.L.R.B.* v. *Barney's Supercenter, Inc.*, 296 F.2d 91 (3d Cir. 1961).

### 3. The scope of the bargaining unit

The amended complaint describes the unit alleged to be appropriate in this case as:

> All truck drivers employed at Respondent's Harrison location, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

Respondent's answer denied "knowledge or information sufficient to form of [sic] belief as to the allegations . . . and therefore leave Petitioner to its proofs."

The parties stipulated at the hearing that, on November 8, 1978, Respondent employed 23 individuals either as drivers or owner-operators and their names were alleged in paragraph 26 of the amended complaint.

Those drivers are listed here, the owner-operators and salaried drivers in separate columns, having been identified by themselves or by testimony of William Sanzalone:

[50] Another card, that of Ramon Ortiz, was received in evidence. However, Ortiz testified that on November 8 he was actually employed by another employer, M M & L Trucking, and did not work for the Spiegel interests. In her brief, the General Counsel states that she no longer contends that Ortiz is in the bargaining unit. In view of Ortiz' testimony I find that he was not an employee of Respondent until after the conclusion of the events in this case.

| *Salaried drivers* | *Owner-operators* |
|---|---|
| James Braime | Leroy Chandler |
| Thomas McCue | Willie Biggins |
| Douglas Cleveland | Joseph Stevens |
| Jose Santiago | Matthew Spencer |
| Chris Miller | Sterling Campbell |
| Collie Stradford | Clarence Allen |
| James Morrison | Leroy Allen |
| Berkley Smith, Sr. | Ernest Gause |
| Berkley Smith, Jr. | Vander Ezzell |
| McKinley Young | David Brown[51] |
| Virnar Williams[52] | John Hobbs[53] |

The evidence shows that the truck drivers employed by Isadore Spiegel, an individual doing business as Spiegel Trucking Company and by Spiegel Trucking Company, Inc., constitute a homogeneous and readily identifiable group having a separate community of interest from other employees. Indeed, the only other employees of these two entities mentioned at the hearing were the dispatchers, Gonnella, DiCola, and Valenti, the salesman Yerkie, and a bookkeeper, Vickie Brandt. The mechanics mentioned in the list of grievances were apparently employed in a different part of the operation. Sanzalone was quoted by Hobbs as dismissing the mechanics as "not our end of the business . . . . We can't do anything about that." Thus, insofar as an overall unit of drivers is concerned, such a unit, in the absence of any countervailing factors presented by the evidence here, is appropriate. *The Salvation Army, Inc.*, 225 NLRB 406 (1976).

With respect to the unit placement of John Hobbs, who admittedly was being paid by I & L at the time of the strike, the evidence shows that Hobbs had been working for Spiegel since 1970. In June 1978 Spiegel sent him to work in the warehouse.[54] Spiegel told Hobbs he would be working exclusively out of the warehouse, but that he would also receive orders from Sanzalone and Gonnella. While he was working at the warehouse he was paid by I & L, although the checks were signed by Spiegel. Further, Hobbs testified that he frequently saw Gonnella to receive assignments, and that his bonus checks were drawn on Spiegel Trucking Company. The truck that he drove also bore Spiegel's name, not that of I & L, and the work he performed was the same as he had done before June.

Hobbs stated that when Sussman, Spiegel's assistant at I & L, needed additional drivers he would call Gonnella and obtain help from other Spiegel employees.

It seems clear that Hobbs considered that his relationship as an employee of Spiegel had not changed by his assignment to the warehouse and this feeling was shared by Respondent. In assigning him to I & L, Hobbs quoted Spiegel as saying he would be "working exclusively out of the warehouse and in between he would come down and get orders from Sanzalone and Gonnella." There was no statement that his status as an employee of Spiegel was changed.[55] Hobbs continued to drive a Spiegel truck, doing the same work he had always done and continued to receive additional assignments from Gonnella and Sanzalone.

More significantly, after Hobbs had joined the walkout on November 7, it was not Sussman who called him to return to work, but Gonnella, and it was not Sussman, but Gonnella, who told him he was fired if he did not he did not report. The telegrams offering reinstatement to Hobbs were not sent by I & L but by Spiegel Trucking. When Hobbs applied for unemployment compensation he named Spiegel Trucking as his employer. There is no evidence that Respondent objected to this or made an issue of it.

I thus find that Hobbs was not an employee of I & L, but was assigned or detailed to that location on a more or less permanent basis while he continued as an employee of Isadore Spiegel. The latter, as is shown by the evidence, never relinquished his right of control over Hobbs, both before and after the strike on November 8. As an employee of Isadore Spiegel Hobbs is properly included within the unit of Spiegel drivers.

There were, however, other drivers employed by I & L.[56] One of these was said by Hobbs to be the driver of a straight truck, and two others were described by him as owner-operators. There is no evidence in this record that any of these drivers shared a community of interest with Spiegel drivers, other than the fact that they all worked for a single employer, and that Spiegel signed all the checks. There is no evidence of actual interchange of these employees to other Spiegel operations, or that they shared the same supervision or working conditions as the others. They did not join the strike, as Hobbs did, and were not involved with the Union or the offers of reinstatement.

Thus, I find that the driver employees of I & L do not share a sufficient community of interest with the other employees in the unit I have found appropriate here to warrant their inclusion therein.

4. The status of the owner-operators

As I have found, there were nine individuals on November 8 who were classified by Respondent as owner-operators. The General Counsel maintains that these persons are employees who should be included in the bargaining unit of drivers. Respondent avers that they are independent contractors, not employees at all, and opposes their inclusion in the unit.

[51] Brown testified that he had been an owner-operator but was salaried at the time of the walkout on November 8.

[52] Williams testified that he had been an owner-operator until 2 weeks before the strike when his truck broke down and he became a salaried driver.

[53] Hobbs was employed by I & L at the time of the strike. His situation and that of other I & L drivers will be discussed below.

[54] I & L Trucking is apparently referred to by Spiegel and his employees as "the warehouse."

[55] The fact that Hobbs was henceforth paid by I & L checks is not significant here since Isadore Spiegel signed all the checks for all the entities involved here.

[56] In a discussion in the record of this case concerning the General Counsel's subpena of any collective-bargaining agreements between Respondent and other labor organizations, it was admitted by Respondent's counsel that there was a current agreement between I & L and Local 617, Teamsters. However, on the representation of Respondent's counsel that I & L did not employ any drivers, and that the contract did not cover the proposed driver unit, I did not direct that the agreement be produced. Since the evidence shows that counsel was mistaken in stating that I & L has no drivers, I cannot say whether the agreement covered the drivers employed by I & L.

William Sanzalone confessed his relative unfamiliarity with the operations of Respondent prior to his full-time employment at Harrison, but he did produce in response to the General Counsel's subpena several documents from Respondent's business records which bore the title of "Operating Agreement." These had the purported signatures of David Brown, Willie Biggins, Clarence Allen, and Joseph Stevens. The Brown agreement also bears what purports to be the signature of Isadore Spiegel. On the others, the other signatures are illegible. Neither Brown nor Allen was asked to verify that he had executed these documents. Biggins and Stevens did not testify. However, another document in evidence is the list of grievances which was signed by a number of employees on the morning of November 8. This document and its signing by employees was attested to by John Hobbs and I find that it does in fact bear the signatures of employees, including those of Brown, Biggins, Allen, and Stevens. I have compared the signatures of these individuals on these documents, and also on the union authorization cards in evidence, and I find that they are the same as the signatures purporting to be the signatures of these individuals on the operating agreements. I find that the agreements were executed by the individuals whose signatures appear thereon.

In reviewing the operating agreements, all of which are identical, it may first be noted that reference is made in the operating agreement to another agreement between the same parties, Spiegel Trucking and the individuals, and referred to as a "Lease Agreement" in which Spiegel Trucking is referred to as "Lessor" and the individual as "Lessee." These lease agreements were not introduced into evidence, but the testimony of Sanzalone makes it fairly clear that those agreements were a method whereby Respondent sold tractors under a type of conditional sales arrangement under which title to the tractors would remain in Respondent until final payment of the selling price plus whatever interest was charged as a part of the transaction.

Sanzalone also testified that all of the owner-operators, except "maybe one or two" were purchasing tractors in this way. Since Respondent made no effort to identify these "one or two" drivers who either owned their equipment outright or were purchasing it from another source, when such information must have been specifically known to Respondent, I infer for the purposes of this Decision that in fact all of the owner-operators were in the process of purchasing tractors from Spiegel at the time of the walkout on November 8.

The references in the operating agreements to the lease agreements conclude by specifying that a breach of the former constitutes a breach of the latter as well. I infer and find, since the lease agreements are not in evidence, that the reverse is also true, that a breach of the lease agreements will constitute a breach of the operating agreements. Before any further analysis of the terms of the operating agreements, this state of facts puts into serious question the real independence of the owner-operators in this case.

Beyond this, the operating agreement states that the individual (referred to in the agreement as the "Contractor") will be exclusively engaged in operating his leased equipment for the hauling of trailers owned by Spiegel Trucking. The contractor is described as "an independent contractor and is not an agent, servant or employee of the Company." The contractor is required to pay salaries and benefits to any drivers or helpers and all payroll taxes applicable for such employees of the contractor. All such drivers must be approved by the president of the company and by the Interstate Commerce Commission, the State and Federal Departments of Transportation, and the State Public Utilities Commission.[57] The contractor also has the responsibility to maintain, service, and keep the leased equipment in good repair and to furnish the Company with maintenance records showing all repairs and replacements of parts or tires, to pay for all fuel, oil, tires, and other equipment, to pay all fines and penalties incurred through the operation of the leased equipment, pay for all permits, bonds, and licenses required by Federal, state, or local law, to pay for all taxes assessed against the vehicle. The vehicle is not to be used for any purposes other than those encompassed in the agreement.[58] The contractor is required to keep complete trip logs and to report any accident or event involving injury or damage arising out of the use of the equipment. The company reserves the right to approve and authorize any settlement of any claim arising out of the operation of the equipment.

The contractor is also required to report to the Company's dispatcher at least once on each working day, more often if requested by the dispatcher, and to park the leased tractor when not in use, or being serviced or repaired at the company premises, known as "Spiegel City," in an area specified by the Company.

The contractor is bound not to refuse to haul any load assigned by the Company's dispatcher, using the leased equipment or other equipment supplied by the Company.

The Company, for its part shall comply with all applicable laws and regulations, including those promulgated by the ICC, supply parking spaces for the leased equipment, and carry a cargo loss policy and a liability policy for personal injury and property damage covering the leased equipment and trailers.

The Company further is authorized to deduct weekly amounts to pay for workmen's compensation insurance for the contractor and any drivers or helpers.

The parties also agree that the contractor shall not assign his interest in the operating agreement without the approval of the Company, that only the leased equipment described in the lease agreement is to be used, and that the payments to the contractor shall be made according to a schedule attached to the agreement.[59]

The agreements provide for expiration 180 days after the passage title under the lease agreement unless termi-

[57] The evidence shows that none of the owner-operators here employed any other drivers or helpers.

[58] There was no evidence of any subleasing or use of vehicles covered by these agreements in any manner except to haul for Respondent.

[59] It is noted that only the agreement between Spiegel and Brown has a schedule of payments attached. This schedule shows amounts to be paid for trips to a number of designated cities, as well as rates for local and pier work, indicating that the owner-operators were used on both local and over-the-road work.

nated earlier by either party and is renewable from year to year otherwise.[60]

Beyond the terms of this agreement, Matthew Spencer, an owner-operator, testified that he and the other owner-operators paid all their expenses, including service and maintenance of their tractors, insurance, and tolls. Spiegel deducted the costs of workmen's compensation and paid for half of the fees for license plates and registration of the vehicles.[61]

The owner-operators were told what trailers to haul and what time to report, but were free to choose the route and method of delivering their assigned loads. Spencer testified that there was no fixed time for reporting to the dispatcher, but he did so after his load was delivered.

Both Hobbs and Sanzalone agreed that the owner-operators were assigned in the same way as salaried drivers and by the same dispatchers. They were obliged to fill in the same paper work and the same rules of discipline applied to all drivers.[62]

The tractors leased by the owner-operators bore Spiegel's name on the doors (or in some cases the name of Transpet) and, of course, operated under Spiegel's ICC rights. As to compensation, Sanzalone testified that he was not familiar with the operating agreements with owner-operators, but that they received 62-1/2 percent of the revenue derived from their work. Each owner-operator was paid weekly as determined by a reconciliation sheet maintained by Respondent showing the trips made, the amounts due on account of those trips, and the deductions made, including advances for trip expenses, repairs, repayment on the loan for the vehicle, workmen's compensation, and a payment called "savings" which apparently refers to payment to a "problem account" set out in the operating agreement.

The evidence shows that the November 2 notice was directed to all drivers, and the concerted actions on November 8 included owner-operators as well as salaried drivers. While the November 18 telegrams were not sent to owner-operators, the January 27 telegrams were so sent.

The Board has been guided by the common law right-of-control test in making a determination whether persons described as owner-operators are truly independent contractors, or are employees. *Deaton Truck Lines, Inc.*, 143 NLRB 1372 (1963).

In this case these are factors which indicate some degree of freedom by the owner-operators. They were free to choose their routes and their methods in delivering their assigned loads. However, these factors are, in my opinion, outweighed by other factors which show extensive control over the owner-operators by Respondent. These factors are: (a) The fact that the tractors leased by the owner-operators bear Respondent's name and operate under his rights and the fact that the registrations remained in Respondent's name; (b) Respondent has the exclusive right to the use of the leased vehicles, the authority to order that service and repairs be made, and requires that the vehicles be garaged at its premises; (c) Respondent unilaterally set the rate of compensation for owner-operators which was generally accepted at least up to November 8; (d) Respondent required owner-operators to accept all assigned loads and set the same conditions for reporting and completion of paperwork as other employees; (e) the same rules (or lack of rules) applied to employees and owner-operators; (f) the operating agreements with the owner-operators was tied in with a lease agreement in the nature of a conditional sales agreement, with provisions which I have inferred and found mandate the breach of one for breach of the other; and, (g) the overall effect of the degree of control over equipment and personnel required by state and Federal regulation of motor carriers as noted in the agreements and in the record of this case.

For these reasons, I find that the owner-operators are employees of Respondent. *Propane Transport, Inc., and Propane Chemical Leasing Co., Inc.*, 247 NLRB 966 (1980).

### 5. The appropriate bargaining unit

In these circumstances I find that the unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All truck drivers employed by Isadore Spiegel, an individual doing business as Spiegel Trucking Company and Spiegel Trucking Company, Inc. at their Harrison, New Jersey, location, including owner-operators but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

### 6. The bargaining obligation

Having found that 19 of Respondent's employees executed authorization cards for the Union on November 8,[63] and having further found that there was a total of 22[64] persons employed by Respondent on that date, the Union represented a majority of Respondent's employees in the unit I have found to be appropriate.

The General Counsel submits that the serious nature of the unfair labor practices here warrants the entry of an order requiring Respondent to bargain with the Union. She relies primarily on *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969). As noted in that case it might be appropriate to impose a bargaining order without need of inquiry into majority status on the basis of cards or otherwise in exceptional cases marked by outrageous and pervasive unfair labor practices. This aspect of *Gissel* is not really an issue here, since the Union did represent a majority of the employees in the unit from and after November 8. The unfair labor practices I have found are

[60] While the Company has the right to terminate the agreements immediately upon the giving of notice, there does not appear to be any similar right in the contracts.

[61] Spiegel, of course, retained title to the vehicles, and held the registrations in his own name. When the strike began, Spencer testified, Spiegel took the license plates off all the leased tractors.

[62] Sanzalone testified that neither owner-operators nor salaried drivers were ever disciplined for refusing to take out a load. There is no other evidence of difference in treatment of the two groups of employees.

[63] Two other employees signed later, either on November 11 or 14.

[64] The parties had stipulated to 23, but with the elimination of Ortiz, this would leave 22.

certainly pervasive, in that they touched upon all but 1 of Respondent's 22 employees, and outrageous, in effecting the discharge of those employees.

The Supreme Court in *Gissel* did go on to approve the Board's use of the bargaining order "in less extraordinary cases marked by less pervasive practices which nonetheless have the tendency to undermine majority strength and impede the election processes." Further, the Court stated, "In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, in balance, be better protected through a bargaining order, then such an order should issue."

The conduct of Respondent here, beginning on November 8 with threats by Gonnella and Sanzalone that employees would be fired if they did not report for work the next day were inherently destructive of the Union's majority. *General Stencils, Inc.*, 195 NLRB 1109 (1972). These threats were not the irresponsible talk of lower-level supervisors. Sanzalone was the general manager, and Gonnella the dispatcher, with broad powers to run the operation. Moreover, the testimony of Hobbs and Stradford shows that Spiegel himself was responsible for the threats, quoting Gonnella as saying, "He's going crazy," and "Spiegel said everybody who was in there was fired."

It may be that none of Respondent's officials did not know of the Union's entrance on the scene at that time, although Sanzalone intimated that he had heard of the Union's involvement as early as November 9. The Union filed a petition on November 9, notice of which would have, in due course, been delivered to Respondent on November 10 or 11. Respondent's certain knowledge of the Union, however, is shown by the testimony of Virnar Williams, who went to the office on November 14 to collect his pay.[65] Williams' testimony shows not only that Isadore Spiegel did not disavow the prior actions of Gonnella and Sanzalone, but, upon Williams' admission that he had signed a union card, summarily discharged him by placing on his check the words "final pay." Thus, all the discharges, together with the failure to reinstate the striking employees may be attributed not only to the employees' protected concerted activities, as alleged in the amended complaint, and found by me, but as shown by the treatment accorded to Williams, to their union activities as well. By discharging its employees because of their concerted activity and their union activity Respondent has engaged in conduct on and after November 8, 1978, which is so pervasive and outrageous as to warrant the issuance of a bargaining order. *Trading Port, Inc.*, 219 NLRB 298 (1975); *Kurt A. Perschke, a sole proprietorship d/b/a Perschke Hay & Grain*, 222 NLRB 60 (1976).

Respondent argues against the issuance of a bargaining order, relying on *Hedstrom Company* v. *N.L.R.B.*, 558 F.2d 1137 (3d Cir. 1977), and *N.L.R.B.* v. *Armcor Industries, Inc.*, 535 F.2d 239 (3d Cir. 1976).

I believe that these cases may be distinguished from the present case. In *Armcor*, the employer was found to have violated the Act through what the court described as "implied surveillance, vague promises of benefits and veiled threats" which were "not certain to disrupt a fair election." The discharges of two employees were viewed by the court as "not necessarily" having intimidated other employees, pointing out that both discharged employees had poor work records, and that "other employees may have perceived that they were discharged for that reason" (*Armcor, supra*). In the instant case, the threats made on November 8 and 9 were not implied, vague, or veiled. They were direct and to the point; if the employee did not report for work he would be fired. These threats were voiced to all or practically all the employees in the bargaining unit. Sanzalone testified that he called all the employees he could reach on those days. He did not know whether others called employees, but the testimony of Hobbs, Berkely Smith, Jr., and Stradford show that Gonnella also made calls containing similar threats. Further the actual discharge of all but one of the employees in the unit, with no possible doubt as to the reason for the discharges, makes this quite a different matter from the situation in *Armcor*.

In *Hedstrom* there were only violations of Section 8(a)(1). The court found that the union had demanded recognition at a time when it did not represent a majority of the employees in the unit. Additionally, the employer in *Hedstrom* did not, as here, peremptorily refuse recognition. In such circumstances the court found no valid demand of recognition by the union. In discussing the Board's remedy, which included a bargaining order, and while conceding that 8(a)(1) violations in and of themselves might have enough of a disruptive effect on an election to warrant a bargaining order, the court found the Board's findings to be conclusory. In the absence of "specific findings" and "detailed analysis" the court remanded the case of the Board.

Thus, in both cases cited by Respondent, there are substantial differences from this case, in *Armcor* differences in degree, in *Hedstrom* differences in type of unfair labor practices, together with, in the latter case, an issue on the demand for recognition which does not exist here.

In this case I think it is clear in the light of my previous findings that I find and conclude that this case would fall within the first category enunciated in *Gissell* but for the fact that the Union had a majority before the unfair labor practices began. Despite the limitation of the Supreme Court's language in *Gissel* it seems to me less than logical to conclude that this category is limited only to those cases where the union never had a majority of employees in the unit. However, it would appear that the language is, at least in some instances, so limited. See *Armcor, supra.*

[65] It is not clear whether Williams went to Respondent's premises before or after the visit of Frantantoni to the same premises.

In evaluating the impact of Respondent's unfair labor practices, which I have found to be persuasive and outrageous, I have considered that the discharge of all but one of the employees would have made it impossible to hold a fair election. In the absence of an order of reinstatement, there would have been no voters at an election, or in this case one voter.

Even assuming that the Board were to issue a reinstatement order, without looking into the minds of the employees it is difficult to assess their attitude if an election were then ordered. However, there is in the record of this case evidence of the words and actions of the participants, and from these I can draw certain conclusions about the possibility of a free and fair election.

First regarding the actions and motivations of Isadore Spiegel himself, I have found that he orchestrated the threats and discharges in the period immediately following the strike. Then, in his conversation with Williams on November 14 he exhibited the same hostility toward his employees' union activity that he had previously toward their concerted activities. Indeed, by his actions toward Williams, Spiegel ratified and confirmed these prior actions.[66] Spiegel's attitude is further exhibited in his conversation on November 14 with Frantantoni. Contemptuously dismissing his employees as "winos and drunks," he went on to describe himself as single, rich, and well-connected, and having no need of "this kind of aggravation," referring unmistakably to the Union and the organizational attempts of his employees. He is still the proprietor, or chief executive, of the entities I have found to make up Respondent here. Thus, I find it impossible to believe that in the face of his actions, and his demonstrated attitude toward his employees' concerted activities, their union activities, and themselves as human beings, a free and fair election could be held in the foreseeable future.

Second, the actions of many of the employees demonstrate the impossibility of holding a free and fair election. According to the testimony of Sanzalone, corroborated to some extent by others, employees began to return to work on and after November 20. The record shows that at least 12 employees abandoned the strike and returned to work between that time and the dates of the hearing in this case. They returned under terms and conditions unilaterally established by Respondent. Obviously, this is not conclusive evidence that the loyalty of these employees had undergone a change, but it is evidence that Respondent's actions had an impact on the pocketbooks as well as the resolution of the employees. I find this to be further evidence that a free and fair election is, in the circumstances of this case, impossible.

[66] Respondent would have me disregard the threats and discharges of November 8 and 9 in considering a bargaining order here, since Respondent's actions were taken without knowledge of the Union's entrance on the scene. I cannot quarantine these actions, because Spiegel's later actions in fact ratify the earlier ones, and because the continuing refusal by Respondent to reinstate its employees to their former positions makes it clear that Respondent's motions cannot be separated into distinct chronological zones, before and after the advent of the Union. The Union had a majority on November 8, and the actions of Respondent on and after that date tended to dissipate that majority, regardless of Respondent's subjective knowledge of union activity.

In all the circumstances, the authorities cited by Respondent do not convince me that a bargaining order is not proper in this case.

7. The changes in working conditions

Having found that Respondent unilaterally changed its method of compensation for its employees on and after November 8, and that the Union represented a majority of Respondent's employees on and after that date, and that Respondent was under an obligation to bargain with the Union on and after that date, I find that Respondent failed to bargain with the Union over those changes,[67] and committed thereby a further violation of Section 8(a)(5) of the Act.

## THE REMEDY

Since I have found that Respondent has engaged in and is engaging certain unfair labor practices I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged the following employees:

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|---|---|
| James Braime | Virnar Williams |
| Thomas McCue | John Hobbs |
| Douglas Cleveland | Leroy Chandler |
| Jose Santiago | Willie Biggins |
| Chris Miller | Joseph Stevens |
| Collie Stradford | Matthew Spencer |
| James Morrison | Sterling Campbell |
| Berkley Smith, Sr. | Leroy Allen |
| Berkley Smith, Jr. | Ernest Gause |
| McKinley Young | Vander Ezzell |
| David Brown | |

I shall recommend that Respondent offer them full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent employment without prejudice to their seniority or other rights and privileges previously enjoyed, and to make them whole for any loss of earnings suffered by reason of the discrimination practiced against them payment to them of sums of money equal to that which they would normally have earned, absent the discrimination, less net earnings during such period, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[68]

As described above, I shall recommend that an order issue requiring Respondent to bargain with the Union, such bargaining order to be effective as of November 8, 1978.[69]

[67] This is undisputed. Sanzalone admitted he never discussed the changes or their implementation with any union representative.

[68] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[69] I issue no further remedial order concerning the unilateral changes in methods of payment since the record is unclear whether this was economically advantageous or not. If not, it can be remedied by the backpay order. If so, a resolution would be better left to the collective-bargaining process.

In view of the serious unfair labor practices I have found here, sufficiently egregious in nature to demonstrate disregard for its employees' statutory rights, I shall recommend a broad cease-and-desist order against Respondent in order to effectuate the policies of the Act.[70]

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By threatening its employees with discharge Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By discharging its employees on November 8, 1978, and thereafter, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. By interrogating its employees about their union activities, and by interrogating employees without the proper statutory safeguards, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.
6. By discharging its employees on and after November 14, 1978, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.
7. By refusing to recognize and bargain with the Union, and by unilaterally changing terms and conditions of employment without notifying or bargaining with the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

## ORDER[71]

The Respondent, Isadore Spiegel, an individual t/a Spiegel Trucking Company, his heirs, administrators, executors, and assigns and Spiegel Trucking Company, Inc., I & L Trucking Company, Inc., their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with discharge and discharging its employees for engaging in union activities or in concerted activities for their mutual aid or protection.

(b) Interrogating its employees about their union activities, or without statutory safeguards.

(c) Refusing to bargain collectively with Local 863, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the collective-bargaining representative of its employees within the appropriate bargaining unit. The appropriate bargaining unit is:

> All truck drivers employed by Isadore Spiegel an individual doing business as Spiegel Trucking Company and Spiegel Trucking Company, Inc. at their Harrison, New Jersey location, including owner-operators, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon demand, recognize the Union as the exclusive representative of all employees in the bargaining unit found appropriate above and bargain with that Union in good faith.

(b) Offer to the employees listed in the section of this Decision entitled "The Remedy" immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings suffered by reason of the discrimination against them in the manner set forth in this Decision in the section entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and all other records necessary to analyze the amount of backpay due under terms of this Order.

(d) Post at its place of business in Harrison, New Jersey, copies of the attached notice marked "Appendix."[72] Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[70] *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[71] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[72] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."